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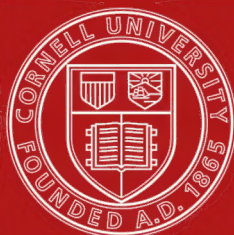
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REPORTED
CASES ON COSTS,
1867-1891.



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1867—1891.

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PREFACE.

THE following pages contain a collection of *verbatim* reprints of the Reports of Cases on questions relating to Costs decided in Ireland since 1867, and also of such of the English cases on the Solicitors' Remuneration Act as are applicable to the law in this country.

It is hoped that the collection will prove of use to the legal professions of both countries, as collecting in one volume cases which are scattered through many volumes and series of Reports.

The Council wish to acknowledge their obligations and return their best thanks to the Incorporated Councils of Law Reporting for Ireland and for England and Wales respectively, and to the proprietors of the *Irish Law Times*, the *Weekly Reporter*, the *Law Times*, and the *Solicitors' Journal*, for their permission to reprint from their several publications the Reports which are here incorporated. A note following the name of each case indicates the source from which the Report has been taken, and refers to other publications where the case is to be found.

The book has been compiled by the Council, with the assistance of Mr. G. Y. DIXON, Barrister-at-law, to whom they desire to offer their thanks for the manner in which he has carried out their wishes.

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TABLE OF CASES.

A

	Page
Allen, <i>Ex parte, In re Merchant Shipping Act</i>, 7 L. R. Ir. 124 .	223
Allen, <i>In re</i>, 34 Ch. D. 433; 35 W. R. 218; 56 L. T. 6; 56	
L. J. Ch. 487	348
Allen, <i>Guinea v.</i>, I. R. 1 C. L. 331; 1 Ir. L. T. 6	1
Allen v. O'Callaghan , 10 Ir. L. T. R. 131	172
Anthony v. Walshe , 22 L. R. Ir. 619	425
Armagh Election Petition, <i>In re</i> , 10 Ir. L. T. R. 178	181
Atkinson, <i>In re</i>, and the Lurgan Town Commissioners , 24 L. R.	
Ir. 182	498
Atkinson v. Gregory , 1 Ir. L. T. 157	5
Aylesford, Earl of, v. Poulett Earl (1891) , 1 Ch. 248; 39 W. R.	
106, 241; 63 L. T. 519; 64 L. T. 336; 60 L. J. Ch. 204 .	657

B

Bailward, <i>Newbould v.</i> , 14 App. Cas. 1; 37 W. R. 401; 59 L. T. 906	483
Bann Navigation Act, <i>In re</i> , 17 L. R. Ir. 168	319
Beamish's Trusts, <i>In re</i> , 5 Ir. L. T. R. 104	73
Beaumont, <i>Kennedy v.</i> , 24 I. L. T. R. 95	632
Beck, <i>In re</i> , 24 Ch. D. 608; 31 W. R. 910; 49 L. T. 95; 52	
L. J. Ch. 815	235
Belfast Mineral Water Co. v. Dempsey , 25 Ir. L. T. 587	681
Belfast Water Commissioners, <i>In the matter of the, Ex parte Orr;</i>	
<i>Ex parte Usher; Ex parte Connor</i> ; 21 L. R. Ir. 342	463
Bell v. M'Nally , 16 Ir. L. T. R. 14	226
Beresford, <i>Riggs v.</i> (Armagh Election) , 10 Ir. L. T. R. 178	181
Best, <i>Dennis v.</i> , 12 Ir. L. T. R. 152	194
Billing, <i>Birmingham v.</i> , I. R. 9 C. L. 287	147
Birmingham v. Billing , I. R. 9 C. L. 287	147
Blair v. Cordner , 19 Q. B. D. 516; 36 W. R. 109	409
Blenkhorn, <i>Parker v.</i> , 14 App. Cas. 1; 37 W. R. 401; 59 L. T. 906	483
Blee, <i>Lapsley v.</i> , 6 L. R. Ir. 155; 13 Ir. L. T. R. 174	200

	Page
Blencowe, Metcalfe v., <i>In re</i> Metcalfe, 36 W. R. 137; 57 L. T. 925; 57 L. J. Ch. 82	412
Bolingbroke v. O'Rorke, 11 Ir. L. T. R. 101	185
Bolton, Thompson Bros. v., 22 I. L. T. R. 96	472
Bonass, <i>Ex parte</i> , <i>In re</i> Purcell and Lenehan, 27 L. R. Ir. 375	689
Bourke, Chapple v., I. R. 3 Eq. 270; 3 Ir. L. T. 238	18
Boyd's Trusts, I. R. 1 Eq. 489; 1 Ir. L. T. 731	15
Brady v. Tuckey, 12 Ir. L. T. 309	193
Bray Electric Tramway, <i>In re</i> , 23 L. R. Ir. 116	531
Bridewell Hospital, <i>In re</i> , 57 L. T. 155	403
Brownrigg, Leonard v., I. R. 6 C. L. 161; 6 Ir. L. T. 7	82
Brunker v. North, 15 Ir. L. T. R. 10	214
Buckley, Eager v., 8 L. R. Ir. 99; 15 Ir. L. T. R. 60	225
Buckley, Ferguson to (<i>Ex parte</i>), 21 L. R. I. 392	467
Byrne, Devitt v., 8 L. R. Ir. 99; 15 Ir. L. T. R. 60	225
Byrne v. M'Evoy, I. R. 5 C. L. 568; 6 Ir. L. T. R. 22	78

C

Carter v. Rackham, <i>In re</i> Rackham, W. N. 1889, 214	597
Cartington's Estate, <i>In re</i> , 24 Ch. D. 608; 31 W. R. 910; 49 L. T. 95; 52 L. J. Ch. 815	235
Caruth, <i>Ex parte</i> , 25 L. R. Ir. 478; 25 Ir. L. T. R. 6	653
Chapple v. Bourke, I. R. 3 Eq. 270; 3 Ir. L. T. 238	18
Chichester, De Burgh v., I. R. 4 Eq. 623; 5 Ir. L. T. R. 1	60
Clarke, Doran v., 24 Ir. L. T. R. 34	600
Connor, <i>Ex parte</i> , <i>In re</i> Belfast Water Commissioners, 21 L. R. Ir. 342	463
Connor, Robb v., I. R. 9 Eq. 373; 9 Ir. L. T. R. 115	135
Cooke, Haig v., 24 Ir. L. T. R. 56	606
Cordner, Blair v., 19 Q. B. D. 516; 36 W. R. 109	409
Crotty, Lindsay v., I. R. 1 C. L. 731; 1 Ir. L. T. 280	5
Crowder v. Irish North-Western Railway Co., I. R. 4 C. L. 371; 3 Ir. L. T. 465	19
Cusack, Jessop v., 25 L. R. Ir. 244	634

D

Dean, <i>In re</i> , 32 Ch. D. 209; 55 L. J. Ch. 420	329
De Burgh v. Chichester, I. R. 4 Eq. 623; 5 Ir. L. T. R. 1	60
Dempsey, Belfast Mineral Water Co. v., 25 Ir. L. T. 587	681

	Page
Denne, <i>In re</i> , 33 W. R. 120; 51 L. T. 657; 54 L. J. Ch. 45	266
Dennis v. Best, 12 Ir. L. T. R. 152	194
D'Esterre, O'Meara v., 21 L. R. Ir. 135	415
Devitt v. Byrne, 8 L. R. Ir. 99; 15 Ir. L. T. R. 60	225
Doherty, Kearse v., 21 L. R. Ir. 381	448
Dolan, Ryan v., I. R. 7 Eq. 92	104
Doran v. Clarke, 24 Ir. L. T. R. 34	600
Dub. & Wick. Ry. Co., O'Sullivan v., I. R. 2 C. L. 124; 1 Ir. L. T. 675	11
Dublin (South) City Market Company, <i>In re</i> ; <i>Ex parte</i> Keatley, 25 L. R. Ir. 265	641
Dyott v. Reade, 10 Ir. L. T. R. 110	157

E

Eager v. Buckley, 8 L. R. Ir. 99; 15 Ir. L. T. R. 60	225
Eakin, Lang v., 1 Ir. L. T. 631	10
Eason, Johnson v., 5 Ir. L. T. R. 6	41
Emanuel and Simmonds, <i>In re</i> , 33 Ch. D. 40; 34 W. R. 613; 55 L. T. 79; 55 L. J. Ch. 710	332

F

Ferguson to Buckley (<i>Ex parte</i>), 21 L. R. Ir. 392	467
Field, <i>In re</i> , 29 Ch. D. 608; 33 W. R. 553; 52 L. T. 480; 54 L. J. Ch. 661	278
Fitzgibbon, Long v., 20 L. R. Ir. 12; 21 Ir. L. T. R. 13	382
Fleming v. Hardcastle, 33 W. R. 776; 52 L. T. 851	290
Fraser, Ryan v., 16 L. R. Ir. 253	256
Fry v. James, I. R. 4 Eq. 255; 4 Ir. L. T. 162	21

G

Gallaher, Goodbody v., 16 L. R. Ir. 336	311
Gallard, <i>In re</i> , <i>Ex parte</i> Harris, 21 Q. B. D. 38	443
Galway Election Petition (<i>Trench v. Nolan</i>), I. R. 7 C. L. 445; 7 Ir. L. T. R. 188	108
Garrett, Palmer v., I. R. 5 C. L. 412; 5 Ir. L. T. 165	74
Garvey, O'Halloran v., I. R. 9 C. L. 551; 10 Ir. L. T. R. 20	167
Glascodine and Carlyle, <i>In re</i> , 52 L. T. 781	308
Goodbody v. Gallaher, 16 L. R. Ir. 336	311
Gray, Quin v., I. R. 1 C. L. 223	8

	Page
Greene, Leclerc <i>v.</i> , I. R. 4 C. L. 388; 4 Ir. L. T. 780	44
Gregg <i>v.</i> Johnston, 25 Ir. L. T. R. 20	651
Gregory, Atkinson <i>v.</i> , 1 Ir. L. T. 157	5
Greville's Settlement, <i>In re</i> , 40 Ch. D. 441; 37 W. R. 150; 58 L. J. Ch. 256; 60 L. T. 43	475
Greville <i>v.</i> Kirk, 10 L. R. Ir. 41	227
Grey's Brewery Co., <i>in re</i> , 56 L. T. 298; 31 S. J. 219	377
Griffiths <i>v.</i> Patterson, 22 L. R. Ir. 656	452
Guinea <i>v.</i> Allen, I. R. 1 C. L. 331; 1 Ir. L. T. 6	1

H

Haig <i>v.</i> Cooke, 24 Ir. L. T. R. 56	606
Hannan <i>v.</i> Laffan, 15 Ir. L. T. R. 32	218
Harbison, MacIver <i>v.</i> , 21 L. R. I. 241	441
Hardcastle, Fleming <i>v.</i> , 33 W. R. 776; 52 L. T. 851	290
Harris, <i>Ex parte</i> , <i>In re</i> Gallard, 21 Q. B. D. 38	443
Haslam <i>v.</i> O'Connor, I. R. 6 Eq. 615	99
Hasties and Crawford, <i>Re</i> , 36 W. R. 572	437
Hayden, Mary, <i>In the goods of</i> , 23 Ir. L. T. 566	557
Heffernan <i>v.</i> Vaughan, 18 Ir. L. T. R. 38	254
Hester <i>v.</i> Hester, 34 Ch. D. 607; 35 W. R. 233; 55 L. T. 862; 56 L. J. Ch. 247	360
Hickey <i>v.</i> O'Connor, I. R. 8 C. L. 509	133
Hickley and Steward, <i>In re</i> , 33 W. R. 320; 52 L. T. 89; 54 L. J. Ch. 608	270
Higgins, Minors, <i>In re</i> , 23 L. R. Ir. 596	598
Hill <i>v.</i> Spurgeon, <i>In re</i> Love, 40 Ch. D. 637; 37 W. R. 475; 60 L. T. 254	511
Holmes, Ward <i>v.</i> , 32 Ch. D. 209; 55 L. J. Ch. 420	329
Hone <i>v.</i> Hutchinson, I. R. 7 Eq. 56	91
Humphreys <i>v.</i> Jones, 31 Ch. D. 30; 34 W. R. 1; 53 L. T. 482; 55 L. J. Ch. 1	316
Hutchinson, <i>Ex parte</i> , <i>In re</i> Renewable Leasehold Conversion Act, I. R. 7 Eq. 56	91
Hutchinson, Hone <i>v.</i> , I. R. 7 Eq. 56	91

I

Irish North-Western Railway Co., Crowder <i>v.</i> , I. R. 4 C. L. 371; 3 Ir. L. T. 465	19
------------------------------------------------------------------------------------------------------	----

J

	Page
James, Fry <i>v.</i> , I. R. 4 Eq. 255; 4 Ir. L. T. 162 . . .	21
Jameson <i>v.</i> Royal Insurance Co., 8 Ir. L. T. 375 . . .	131
Jessop <i>v.</i> Cusack, 25 L. R. Ir. 244 . . .	634
Johnson <i>v.</i> Eason, 5 Ir. L. T. R. 6 . . .	41
Johnston, Gregg <i>v.</i> , 25 Ir. L. T. R. 20 . . .	651
Jones, Humphreys <i>v.</i> , 31 Ch. D. 30, 34 W. R. 1; 53 L. T. 482; 55 L. J. Ch. 1 . . .	316

K

Kearse <i>v.</i> Doherty, 21 L. R. Ir. 381 . . .	448
Keatley, <i>Ex parte</i> , <i>In re</i> Dublin South City Market Company, 25 L. R. Ir. 265 . . .	641
Keeping, and Gloag, <i>Re</i> , 58 L. T. 679 . . .	433
Kennedy, Talbot <i>v.</i> , 1 Ir. L. T. 44 . . .	3
Kennedy <i>v.</i> Beaumont, 24 I. L. T. R. 95 . . .	632
Kilmallock Union, Guardians of, O'Malley <i>v.</i> , 22 L. R. Ir. 326 .	447
Kirk, Greville <i>v.</i> , 10 L. R. Ir. 41 . . .	227

L

Lacey & Son, <i>In re</i> , 25 Ch. D. 301; 32 W. R. 233; 49 L. T. 775; 53 L. J. Ch. 287 . . .	238
Laffan, Hannan <i>v.</i> , 15 Ir. L. T. R. 32 . . .	218
Lanagan, M'Sheffrey <i>v.</i> , 20 L. R. Ir. 528 . . .	397
Lang <i>v.</i> Eakin, 1 Ir. L. T. 631 . . .	10
Lapsley <i>v.</i> Blee, 6 L. R. Ir. 155; 13 Ir. L. T. R. 174 . . .	200
Leclerc <i>v.</i> Greene, I. R. 4 C. L. 388; 4 Ir. L. T. 780 . . .	44
Leonard <i>v.</i> Brownrigg, I. R. 6 C. L. 161; 6 Ir. L. T. 7 . . .	82
Lindsay <i>v.</i> Crotty, I. R. 1 C. L. 731; 1 Ir. L. T. 280 . . .	5
Locke, Palmer <i>v.</i> , 21 Ir. L. T. R. 32 . . .	411
London N.-W. Ry. Co., Mape <i>v.</i> , I. R. 1 C. L. 563 . . .	14
Long <i>v.</i> Fitzgibbon, 20 L. R. Ir. 12; 21 Ir. L. T. R. 13 . . .	382
Love <i>In re</i> Hill <i>v.</i> Spurgeon, 40 Ch. D. 637; 37 W. R. 475; 60 L. T. 254 . . .	511
Lynch <i>v.</i> Macan (No. I.), 26 L. R. Ir. 385; 24 Ir. L. T. R. 89 .	645
Lynch <i>v.</i> Macan (No. II.), 26 L. R. Ir. 388; 24 Ir. L. T. R. 89	648
Lurgan Town Commissioners and Atkinson, <i>In re</i> , 24 L. R. Ir. 182 . . .	498

M		Page
Macan, Lynch <i>v.</i> (No. I.), 26 L. R. Ir. 385; 24 Ir. L. T. R. 89		645
Macan, Lynch <i>v.</i> (No. II.), 26 L. R. Ir. 388; 24 Ir. L. T. R. 89		648
MacGowan, <i>In re</i> , Macgowan <i>v.</i> Murray (1891), 1 Ch. 105; 39 W. R. 227; 63 L. T. 793; 60 L. J. Ch. 118		667
MacGowan <i>v.</i> Murray, <i>In re</i> , MacGowan (1891), 1 Ch. 105; 39 W. R. 227; 63 L. T. 793; 60 L. J. Ch. 118		667
MacIver, deceased, MacIver <i>v.</i> Harbison, 21 L. R. Ir. 241		441
Maguire <i>v.</i> O'Connor, 1 Ir. L. T. 702		13
Malone, M'Namara <i>v.</i> , 18 L. R. Ir. 269; 20 Ir. L. T. R. 24		343
Mandeville, Scully <i>v.</i> , 10 L. R. Ir. 327		231
Mape <i>v.</i> London N.-W. Ry. Co., 1 R. 1 C. L. 563		14
Marsden's Estate, <i>In re</i> , Withington <i>v.</i> Neumann, 40 Ch. D. 475; 58 L. J. Ch. 260		522
Martin (a lunatic). <i>In re</i> 41 Ch. D. 381; 33 S. J. 398, W. N. 1889, 84		546
Martin <i>v.</i> Nixon, 22 L. R. Ir. 138; 22 Ir. L. T. R. 9		423
Mayor of London, <i>Ex parte</i> , 34 Ch. D. 452; 35 W. R. 210; 56 L. T. 13; 56 L. J. Ch. 308		371
Merchant Shipping Act, 1854, <i>In re</i> , 7 L. R. Ir. 124		223
Merchant Taylors' Co., <i>In re</i> , 29 Ch. D. 209; 33 W. R. 542		287
Merchant Taylors' Co., <i>In re</i> , 30 Ch. D. 28; 33 W. R. 693; 52 L. T. 775; 54 L. J. Ch. 867		294
Metcalfe, <i>In re</i> , Metcalfe <i>v.</i> Blencowe, 36 W. R. 137; 57 L. T. 925; 57 L. J. Ch. 82		412
M'Evoy, Byrne <i>v.</i> , 1 R. 5 C. L. 568; 6 Ir. L. T. R. 22		78
M'Grath, <i>Ex parte</i> , <i>In re</i> Roache's Estate, 25 L. R. Ir. 256		616
M'Mahon <i>v.</i> N.-W. Ry. Co., 1 R. 5 C. L. 200		67
M'Nally, Bell <i>v.</i> , 16 Ir. L. T. R. 14		226
M'Namara <i>v.</i> Malone, 18 L. R. Ir. 269; 20 Ir. L. T. R. 24		343
Moore, Thompson <i>v.</i> , 25 L. R. Ir. 98		609
Montague, Scott and Baker, <i>In re</i> W. N. 1889, 40		530
Mortimer, <i>In re</i> , 1 R. 9 Eq. 96, 4 Ir. L. T. 87		23
M'Sheffrey <i>v.</i> Lanagan, 20 L. R. Ir. 528		397
Murphy <i>v.</i> Nolan, 1 R. 7 Eq. 498		126
Murray, MacGowan <i>v.</i> , <i>In re</i> MacGowan (1891), 1 Ch. 105; 39 W. R. 227; 63 L. T. 793; 60 L. J. Ch. 118		667
Myers <i>v.</i> Phelan, 26 L. R. Ir. 218; 24 Ir. L. T. R. 60		558

N

	Page
Nesbitt, <i>The Queen v.</i> , 20 Ir. L. T. R. 56	323
Neumann, <i>Withington v.</i> , <i>In re Marsden's Estate</i> , 40 Ch. D. 475 ; 58 L. J. Ch. 260	522
Newbould <i>v. Bailward</i> , 14 App. Cas. 1; 37 W. R. 401; 59 L. T. 906	483
Newry Steam Aerated Co. <i>v.</i> ——— 9 Ir. L. T. 194	151
Nixon, <i>Martin v.</i> , 22 L. R. Ir. 138; 22 Ir. L. T. R. 9	423
Nolan, <i>Murphy v.</i> , I. R. 7 Eq. 498	126
Nolan, <i>Trench v.</i> (Galway Election Petition), I. R. 7 C. L. 445 ; 7 Ir. L. T. R. 189	108
North, <i>Brunker v.</i> , 15 Ir. L. T. R. 10	214
N.-W. Ry. Co., <i>McMahon v.</i> , I. R. 5 C. L. 200	67

O

O'Callaghan, <i>Allen v.</i> , 10 Ir. L. T. R. 131	172
O'Callaghan, <i>In re</i> , 19 L. R. Ir. 32	324
O'Connor, <i>Haslam v.</i> , I. R. 6 Eq. 615	99
O'Connor, <i>Hickey v.</i> , Ir. R. 8 C. L. 509	133
O'Connor, <i>Maguire v.</i> , 1 Ir. L. T. 702	13
O'Hagan, <i>Ex parte</i> , 19 L. R. Ir. 99 ; 21 Ir. L. T. 164	386
O'Halloran <i>v. Garvey</i> , I. R. 9 C. L. 551; 10 Ir. L. T. R. 20	167
Olpherts, <i>Ex parte</i> , 17 L. R. Ir. 168	319
O'Malley <i>v. Guardians of Kilmallock Union</i> , 22 L. R. Ir. 326	447
O'Meara <i>v. D'Esterre</i> , 21 L. R. Ir. 135	415
O'Rorke, <i>Bolingbroke v.</i> , 11 Ir. L. T. R. 101	185
Orr, <i>Ex parte</i> , <i>In re Belfast Water Commissioners</i> , 21 L. R. Ir. 342	463
O'Sullivan <i>v. Dub. & Wick. Ry. Co.</i> , I. R. 2 C. L. 124; Ir. L. T. 675	11

P

Palmer <i>v. Garrett</i> , I. R. 5 C. L. 412; 5 Ir. L. T. 165	74
Palmer, <i>In re</i> , 45 Ch. D. 291; 38 W. R. 673, 62 L. T. 778; 59 L. J. Ch. 575	618
Palmer <i>v. Locke</i> , 21 Ir. L. T. R. 32	411
Parker <i>v. Blenkhorn</i> , 14 App. Cas. 1; 37 W. R. 401; 59 L. T. 906	483
Parker, <i>In re</i> , 29 Ch. D. 199; 33 W. R. 541; 52 L. T. 686	273
Patterson, <i>Griffiths v.</i> , 22 L. R. Ir. 656	452
Phelan, <i>Myers v.</i> , 26 L. R. Ir. 218; 24 Ir. L. T. R. 60	558

	Page
Purcell and Lenehan, <i>In re, Ex parte Bonass</i> , 27 L. R. Ir. 375 .	689
Poulett Earl, Aylesford, Earl of, <i>v.</i> (1891), 1 Ch. 248; 39 W. R. 106, 241; 63 L. T. 519; 64 L. T. 336; 60 L. J. Ch. 204 .	657

Q

Quin <i>v.</i> Gray, I. R. 1 C. L. 223	8
"Queen," <i>The</i> , 3 Ir. L. T. 101	16
Queen (<i>The</i>) <i>v.</i> Nesbitt, 20 Ir. L. T. R. 56	323

R

Rackham, Carter <i>v.</i> , <i>In re Rackham</i> , W. N. 1889, 214	597
Rackham, <i>In re</i> , Carter <i>v. Rackham</i> , W. N. 1889, 214	597
Reade, Dyott <i>v.</i> , 10 Ir. L. T. R. 110	157
Reade, Salthouse <i>v.</i> , <i>In re Read's Trusts</i> , 33 S. J. 219	528
Reade's Trusts, <i>In re</i> , Salthouse <i>v. Reade</i> , 33 S. J. 219	528
Rees, <i>Re</i> , Rees <i>v. Rees</i> , 58 L. T. 69	417
Renewable Leasehold Conversion Act, <i>In re Ex parte Hutchinson</i> , I. R. 7 Eq. 56	91
Richardson, Tisdall <i>v.</i> , 20 L. R. Ir. 199	395
"Rivoli" and Cargo, <i>the</i> , 4 Ir. L. T. 454	29
Roache's Estate, <i>In re, Ex parte M'Grath</i> , 25 L. R. Ir. 256	616
Riggs <i>v.</i> Beresford (Armagh Election), 10 Ir. L. T. R. 178	181
Robb <i>v.</i> Connor, I. R. 9 Eq. 373; 9 Ir. L. T. R. 115	135
Robertson, <i>In re</i> , 19 Q. B. D. 1; 35 W. R. 833; 56 L. T. 859	389
Roberts, Stanford <i>v.</i> , 26 Ch. D. 155; 32 W. R. 404; 50 L. T. 147; 53 L. J. Ch. 338	248
Robson, <i>In re</i> , 45 Ch. D. 71; 38 W. R. 556; 63 L. T. 372; 59 L. J. Ch. 627	625
Royal Insurance Co., Jameson, <i>v.</i> , 8 Ir. L. T. 375	131
Ryan <i>v.</i> Dolan, I. R. 7 Eq. 92	104
Ryan <i>v.</i> Fraser, 16 L. R. Ir. 253	256

S

Salthouse <i>v. Reade</i> , <i>In re Reade's Trusts</i> , 33 S. J. 219	528
Sealey <i>v.</i> Stawell, I. R. 10 Eq. 206	179
Secretary of State and Denne, <i>In re</i> , 33 W. R. 120; 51 L. T. 657; 54 L. J. Ch. 45	266
Scully <i>v.</i> Mandeville, 10 L. R. Ir. 327	231
Simpson <i>v.</i> Wilson, 17 Ir. L. T. 546	234
Smart <i>v.</i> Verdon, 9 Ir. L. T. 598	153

Table of Cases.

xv

Page

Smith, Pinsent & Co., <i>In re</i> , 44 Ch. D. 303 ; 38 W. R. 685 ; 59 L. J. Ch. 590	613
Spurgeon, Hill v., <i>In re Love</i> , 40 Ch. D. 637 ; 37 W. R. 475 ; 60 L. T. 254	511
Stanford v. Roberts, 26 Ch. D. 155 ; 32 W. R. 404 ; 50 L. T. 147 ; 53 L. J. Ch. 338	248
Stawell, Sealey v., I. R. 10 Eq. 206	179
Steeds, Weston v., 24 L. R. Ir. 283	553
Stewart, <i>In re</i> , 41 Ch. D. 494 ; 37 W. R. 484	533
Strange, <i>Ex parte</i> , 21 L. R. Ir. 529	493

T

Talbot v. Talbot ; Talbot v. Kennedy, 1 Ir. L. T. 44	3
Tisdall v. Richardson, 20 L. R. Ir. 199	395
Thompson Bros. v. Bolton, 22 I. L. T. R. 96	472
Thompson v. Moore, 25 L. R. Ir. 98	609
Tuckey, Brady v., 12 Ir. L. T. 309	193
Trench v. Nolan (Galway Election Petition), I. R. 7 C. L. 445 ; 7 Ir. L. T. R. 188	108

U

United Kingdom Land and Building Association, <i>In re</i> , 40 Ch. D. 471 ; 37 W. R. 486	507
Usher, <i>Ex parte</i> , <i>In re</i> , Belfast Water Commissioners, 21 L. R. Ir. 342	463

V

Vaughan, Heffernan v., 18 Ir. L. T. R. 38	254
Verdon, Smart v., 9 Ir. L. T. 598	153

W

Walker, Wolf v., 14 Ir. L. T. R. 111	212
Walshe, Anthony v., 22 L. R. Ir. 619	425
Ward v. Helmes, 32 Ch. D. 209 ; 55 E. J. Ch. 420	329
Wilson, Simpson v., 17 Ir. L. T. 546	234
Weston v. Steeds, 24 L. R. Ir. 283	553
Withal, <i>In re</i> (1891), 3 Ch. 8 ; 39 W. R. 529 ; 64 L. T. 704 ; 61 L. J. Ch. 14	683
Withington v. Neumann, <i>In re Marsden's Estate</i> , 40 Ch. D. 475 ; 58 L. J. Ch. 260	522
Wolf v. Walker, 14 Ir. L. T. R. 111	212

TABLE OF CASES CITED.

A

Abud v. Riches, 650.
 Allen, *In re*, 365, 366, 367, 370, 412, 414, 487, 537, 620, 516, 519.
 Allhusen v. Malgarejo, 68.
 Alsop v. Oxford (Lord), 159.
 Alwill, Moore v., 229.
 Anderson v. Lamb, 180.
 Arkins v. Armstrong, 75, 77, 80, 84, 88, 134, 558, 562, 564, 567, 568, 569, 571, 572, 574, 580, 581, 582, 583, 584, 588, 590, 592, 595, 596.
 Armstrong, Arkins v., 75, 77, 80, 84, 88, 134, 558, 562, 564, 567, 568, 569, 571, 572, 574, 580, 581, 582, 583, 584, 588, 590, 592, 595, 596.
 Ashcroft v. Foulkes, 259.
 Aston v. L. N.-W. Ry. Co., 20, 68.
 Atkinson & Sons, *In re*, 654, 655, 656.
 Atlantic Royal Mail Steam Packet Co., Watson v., 20.
 Atlantic Steam Co., Powell v., 20, 68.
 Attorney-General v. Nethercote, 525, 526.
 Atty.-Gen. v. Monroe, 102.
 Aynsley v. Glover, 139.

B

Bahia, the, 30, 39.
 Bailward, Newbould v., 528, 536, 548, 552, 630.
 Baines v. Bromley, 260, 261, 264, 463, 682.
 Baker, Smith v., 137.
 Baker v. Oakes, 198.
 Barker, Foot v., 56.
 Barker v. Birch, 41.
 Bann Navigation Act, *In re, ex parte* Olpherts, 390, 393, 495.

Baring, Staunton v. 159.
 Barnard, Carter v., 102.
 Barrow, *In re*, 242.
 Barry, Smith v., 473.
 Bateson, Hartley v., 6.
 Batty v. Kynock, 610.
 Beamish's Trusts, 126.
 Beard v. Perry, 563, 592.
 Beck, *In re*, 317, 690.
 Begbie v. Fenwick, 102.
 Belton, Boyd, v. 93.
 Bennett v. Scott, 134, 169, 170, 171, 208.
 Berdan v. Greenwood, 563, 591.
 Betham v. Fermie, 20, 68.
 Betts v. Cleaver, 160.
 Biddick, the, 30, 36.
 Bilton, Saner v., 220.
 Birch, Barker v., 41.
 Bird v. Higginson, 2.
 Blackmore v. Higgs, 1, 75, 79, 80, 83, 87, 88, 562, 567, 586, 589.
 Blair v. Cordner, 524, 525.
 Blee, Lapsley v., 383, 398.
 Blenkhorn v. Parker, 655, 669, 670, 673.
 Blenkhorn, Parker v., 528, 536.
 Bluck, Richards v., 75, 563, 571, 583, 587.
 Blumer, Hewitt v., 682.
 Blyth v. Fanshawe, 555.
 Boggett, Fewster v., 84, 88, 563, 571, 574, 594.
 Borch, Sichel v., 20, 70.
 Boswell v. Coaks, 650.
 Boulding v. Tyler, 563.
 Bourke, Chapple v., 159.
 Bowes, Laing, v., 127.
 Boyd, Calwell v., 601.
 Boyd v. Belton, 93.
 Bradley, Garnett v., 204, 205, 206, 207, 208, 210, 211, 583, 584, 593.
 Bradnum, Winterfield v., 461.
 Brennan v. Mahony, 169.

Brentini, Mason *v.*, 220.
 Briggs *v.* Calverley, 448.
 Bromley, Baines *v.*, 260, 261, 264,
 463, 682.
 Brooker *v.* Cooper, 171.
 Brooking *v.* South Devon Ry. Co.,
 224.
 Brown, *In re*, 682.
 Brownrigg, Leonard *v.*, 148, 561,
 568, 574, 586.
 Brown *v.* Gallatly, 64.
 Brown *v.* Julian, 6.
 Brown *v.* L. N.-W. Ry. Co., 68, 70,
 Buller, Smith *v.*, 159, 610, 611.
 Burton *v.* Lowe, 83.
 Byrne *v.* McEvoy, 90, 148, 150,
 563.

C

Cahill, Kearney *v.*, 228.
 Caine *v.* Coulson, 175.
 Caldwell *v.* Johnston, 169.
 Callanan, O'Donnell *v.*, 563.
 Callan, McAlister *v.*, 169, 170.
 Calvert *v.* Godfrey, 93.
 Calwell *v.* Boyd, 601.
 Campbell, *Ex parte*, 584.
 Camphausen, Padley *v.*, 208.
 Capel *v.* Staines, 176, 177.
 Carey *v.* Cuthbert, 163.
 Carr, Goutard *v.*, 570.
 Carson *v.* McCullagh, 555.
 Carter *v.* Barnard, 102.
 Cassidy *v.* O'Loughlin, 208, 228.
 Cathcart, *In re*, 584.
 Chapple *v.* Bourke, 159.
 Chatfield *v.* Sedgwick, 219, 220,
 221, 222, 260.
 Chester and Holyhead Ry. Co.,
 Kisbey *v.*, 20.
 Chillingworth, Mackey *v.*, 610.
 Churton *v.* Frewen, 126, 129.
 Claridge *v.* Smith, 170.
 Clarke, Neale *v.*, 220, 260.
 Clarke *v.* Tyne Improvement Com-
 missioners, 37.
 Clark *v.* Malpas, 109.
 Cleaver, Betts *v.*, 160.
 Cloran, O'Farrell *v.*, 232.
 Coaks, Boswell *v.*, 650.
 Cocker, Shuttleworth *v.* 134.
 Cole *v.* Firth, 220.

Colley, Hickman *v.*, 170, 171.
 Connor, Robb *v.*, 159, 170, 162,
 165, 442, 473, 555, 637.
 Cooke *v.* Hopewell, 315.
 Cook, Sandes *v.*, 596.
 Cook, Wiggins *v.*, 398, 400.
 Cooper, Brooker *v.*, 171.
 Cordner, Blair *v.*, 524, 525.
 Cory, Hewitt *v.*, 563.
 Cottrell *v.* Stratton, 197.
 Coughlan *v.* Morris, 563.
 Coulson, Caine *v.*, 175.
 Cousens *v.* Cousens, 159.
 Cox, Horsley *v.*, 102.
 Coyle *v.* Sandford, 57.
 Croker *v.* Croker, 165.
 Crosse *v.* Seaman, 88, 563, 573.
 Crotty, Lindsay, *v.* 9.
 Crowder *v.* N.-W. Ry. Co., 68, 70.
 Crowley, Throckmorton *v.*, 41.
 Crowther *v.* Farrer, 314.
 Cuthbert, Carey *v.*, 163.

D

Dalbiac *v.* Delacour, 229.
 Dale *v.* Hamilton, 317.
 Danby *v.* Lambe, 80, 148, 563.
 D'Arcy *v.* Hastings, 20, 68, 70.
 Davering College Case, 107.
 Davies, Foster *v.*, 107.
 Davis *v.* Earl of Dysart, 101, 102,
 416.
 Davis *v.* Mansell, 9.
 Dawson, Stamford (Earl) *v.*, 189.
 Dean, *In re*, 614, 615.
 Defries, Myers *v.*, 219, 221, 563.
 Delacour, Dalbiac *v.*, 229.
 De la Salle, Ibbett *v.*, 64.
 Denne, *In re*, 292.
 De Vesci *v.* L. N.-W. Ry. Co., 12.
 Devine *v.* London N. W. Ry. Co.,
 75, 79, 80, 83, 88, 89, 562, 565,
 574.
 Dillon, Lord, *Ex parte*, *In re* M.
 G. W. Ry. Co., 465, 466.
 Divers, *In re*, 644.
 Dixon *v.* Pyner, 317.
 Dixon *v.* Walker, 563, 592.
 Dods *v.* Evans, 36.
 Donovan, Gower *v.* 127.
 Downing *v.* Hodder, 26, 29.

Doyle, *app.*, Fenlon, *resp.*, 86.
 Driver, Pooley *v.*, 197.
 Durden, Moore *v.*, 26.
 D. W. W. Ry. Co., O'Sullivan *v.*,
 80.
 Dwyer, Armstrong *v.*, 134.
 Dyott *v.* Reade, 182, 637, 638, 640.
 Dysart, Earl of, Davis *v.*, 101, 102,
 416.

E

Effingham (Earl of), Smith *v.*, 144,
 159.
 Elliott *v.* Kempster, 180.
 Emanuel and Simmonds, *In re*, 351,
 352, 354, 357, 486, 546, 547,
 548, 549, 551, 690, 691.
 Emmott, Staffordshire Bank *v.*,
 314.
 Evans, Dods *v.*, 36.
 Evans *v.* G. S. W. Ry. Co., 68, 69.
 Eyre, Ward *v.*, 244, 292.

F

Falls *v.* Proctor, 189.
 Fanshawe, Blyth *v.*, 555.
 Farmer *v.* Fottrell, 7, 79, 83, 84,
 86, 563, 570, 587.
 Farrer, Crowther, *v.*, 314.
 Farr *v.* Sheriff, 64.
 Faulkner, *In re*, 483, 486.
 Fenlon, *resp.*, Doyle, *app.*, 86.
 Fenwick, Begbie *v.*, 102.
 Ferguson and Buckley, *Ex parte*,
 690.
 Fernie, Betham *v.*, 20, 68.
 Fewster *v.* Boggett, 84, 88, 563,
 571, 574, 594.
 Field, *In re*, 292, 293, 294, 334,
 335, 336, 337, 339, 341, 351,
 352, 353, 354, 486, 515, 516,
 517, 518, 519, 536, 537, 543,
 546, 547, 548, 549, 551, 552,
 627, 630, 690.
 Firth, Cole *v.*, 220.
 Fitzgerald, Poor Law Commrs. *v.*,
 126.
 Fitzgibbon, Long *v.*, 453.
 Fleming *v.* Hardcastle, 299, 353,
 516.
 Flint, Kelly *v.*, 9.
 Foot *v.* Barker, 56.

Foster *v.* Davies, 107.
 Foster, Wheatecroft *v.*, 601, 602,
 603, 604.
 Foulkes, Ashcroft *v.*, 259.
 Fraser, Ryan *v.*, 459, 563.
 Frazer *v.* Quane, 84.
 Frean *v.* Sargent, 398.
 Freer *v.* Rimner, 97.
 Frewen, Churton *v.*, 126, 129.

G

Gallard, *In re*, 690.
 Gallatly, Brown *v.*, 64.
 Galloway *v.* Reyworth, 36.
 Galway Election Petition, 137,
 142, 156, 159, 162, 182, 183,
 184, 473.
 Gardiner, Geoghegan *v.*, 176.
 Garnett *v.* Bradley, 204, 205, 206,
 207, 208, 210, 211, 583, 584,
 593.
 Garratt *v.* Quin, 313.
 Garrett, Palmer *v.*, 79, 80, 83, 89,
 561, 567, 568, 574, 583.
 Gathercole *v.* Smith, 260.
 Gaunt *v.* Taylor, 63.
 Geoghegan *v.* Gardiner, 176.
 Gibb, Original Hartlepool Coll. Co.
v. 220.
 Glascodine and Carlyle, 374.
 Gloag, Pringle *v.*, 345.
 Glover, Aynsley *v.*, 139.
 G. N. Ry. Co., Shiels *v.*, 68.
 Godfrey, Calvert *v.*, 93.
 Gooch *v.* Maltby, 563.
 Goodright (deceased Stevenson) *v.*
 Norright, 175, 178.
 Gore-Langton's Estate, *In re*, 465,
 466.
 Gore, Little *v.*, 555.
 Goutard *v.* Carr, 570.
 Gower *v.* Donovan, 127.
 Grane, Toplis *v.*, 64.
 Gray, *In re*, 624.
 Gray, Morgan *v.*, 2, 44, 56, 57, 59.
 Greene, Thornton *v.*, 654.
 Greenwood, Berdan *v.*, 563, 591.
 Greenwood *Ex parte*, 398.
 Grey's Brewery, *In re*, 444.
 Griffiths *v.* Patterson, 681, 682.
 Griffith *v.* Thomas, 398.
 G. S. W. Ry. Co., Evans *v.*, 68, 69.

Guinness, Hughes *v.*, 75, 76, 84,
87, 88, 532, 561, 571, 572, 573,
588.
Gurney, Pegler *v.*, 112, 113, 156,
184.
G. W. Ry. Co., Tattan *v.*, 11, 12.

H

Hale, Wright *v.*, 228.
Hamilton, Dale *v.*, 317.
Hamilton *v.* Patten, 64.
Hannan *v.* Laffan, 260, 261, 263,
563.
Hardcastle, Fleming *v.*, 299, 353,
516.
Harnor, Smith *v.*, 565, 585.
Harris, *Ex parte*, 690.
Harris *v.* Petherick, 207.
Harrison, *In re*, 244.
Hartley *v.* Bateson, 6.
Haslam *v.* O'Connor, 126, 137, 159,
162, 164.
Hastings, D'Arcy *v.*, 20, 68, 70.
Hearne *v.* Lancashire and York-
shire Ry. Co., 12.
Heffernan *v.* Vaughan, 636, 637.
Hester *v.* Hester, 407, 412, 414,
487, 516, 519, 537, 539, 620.
Hewitt *v.* Cory, 563.
Hewitt *v.* Blumer, 682.
Hickey *v.* O'Connor, 167, 169, 170,
171.
Hickley and Steward, *In re*, 629.
Hiekman *v.* Colley, 170, 171.
Higginson, Bird *v.*, 2.
Higgs, Blackmore *v.*, 1, 75, 79, 80,
83, 87, 88, 562, 567, 586, 589.
Hill *v.* Peel, 109, 112, 113, 156,
184.
Hoey, Power *v.*, 99.
Hodder, Downing *v.*, 26, 29.
Holman *v.* Stevens, 179.
Holme, Lowe *v.*, 260, 263, 264,
682.
Hopewell, Cooke *v.*, 315.
Hoops *v.* Lord Kingston, 63.
Horlock *v.* Smith, 310.
Horsley *v.* Cox, 102.
Hughes *v.* Guinness, 75, 76, 84, 87,
88, 532, 561, 571, 572, 573, 588.
Hull's Estate, *In re*, 92.

Humphreys *v.* Jones, 516.
Hurley *v.* Lawler, 20, 68, 71.
Hurst *v.* Whaley, 2.
Hutchinson, *ex parte*, 126.

I

Ibbett *v.* De la Salle, 64.
Inderwick, *In re*, 624.

J

Jack, Yates *v.*, 139.
Jackson *v.* Newcastle (Duke of),
139.
Jackson *v.* Spittal, 68.
James *v.* Raggett, 6, 9.
James *v.* Vane, 563.
Janson, Turnbull *v.*, 610.
Johnson, Phelan *v.*, 584.
Johnston, Caldwell *v.*, 169.
Jones, Humphreys *v.*, 516.
Jones *v.* Tobin, 36.
Julian, Brown *v.*, 6.

K

Karla, the, 30, 35.
Kearney *v.* Cahill, 228.
Keatinge, *ex parte*, Ren. Leas. Conv.
Act, 93.
Keefe, Ruth *v.*, 452, 453, 454, 456.
Keeping and Gloag, *In re*, 470.
Kelly *v.* Flint, 9.
Kempster, Elliott *v.*, 180.
Kerr *v.* M. G. W. Ry. Co., 11.
Kingston (Lord), Hoops *v.*, 63.
Kisbey *v.* Chester and Holyhead
Ry. Co., 20.
Krupp, Vavas seur, *v.*, 261.
Kynock, Batley *v.*, 610.

L

Lacey, *re*, 267, 268, 272, 283, 285,
292, 293, 310, 371, 373, 374,
435, 470, 472, 478, 481, 486,
515, 516, 627, 630, 690.
Laffan, Hannan *v.*, 260, 261, 263,
563.
Laing, Shrapnel *v.*, 453, 456, 457,
458, 459, 460, 463, 563, 682.
Laing *v.* Bowes, 127.
Lakeman, Raymond *v.*, 281.
Lamb, Anderson *v.*, 180.
Lamb, Danby *v.*, 80, 148, 563.

Lancashire and Yorkshire Ry. Co.,
 Hearne v. 12.
 Lapsley v. Blee, 383, 398.
 Large v. Large, 229.
 Lawler, Hurley v., 20, 68, 71.
 Legge v. Tucker, 11, 12, 84.
 Leonard v. Brownrigg, 148, 561,
 568, 574, 586.
 Lillycrap, Parr v., 75, 571, 573,
 594.
 Limerick & Ennis Ry. Co., *In re*,
 224.
 Lindsay v. Crotty, 9.
 Lindsay, Pearse v., 102, 143, 159.
 Little v. Gore, 555.
 Liverpool Improvement Act, 642,
 644.
 L. N.-W. Ry. Co., Aston v., 20, 68.
 L. N.-W. Ry. Co., Brown v., 68, 70.
 L. N.-W. Ry. Co., De Vesci v., 12.
 L. N.-W. Ry. Co., Devine v., 75,
 79, 80, 83, 88, 89, 562, 565, 574.
 Lonergan v. Royal Insurance Co.,
 555.
 Long v. Fitzgibbon, 453.
 Lord Mayor of London, *Ex parte*,
 470, 471.
 Love, *In re*, 533, 537, 539, 543.
 Lowe, Burton v., 83.
 Lowe v. Holme, 260, 263, 264, 682.
 Lurgan Town Commissioners, *In*
re, 654, 655, 656.

M

Macgowan, *In re*, 686.
 Mackey v. Chillingworth, 610.
 Mahony, Brennan v., 169.
 Malgarejo, Adhusen v., 68.
 Malins v. Price, 109.
 M'Alister v. Callan, 169, 170.
 Malone, M'Namara v., 396, 424,
 650.
 Malpas, Clark v., 109.
 Maltby, Gooch v., 563.
 Mannix, Thomas v., 552, 555.
 Mansell, Davis v., 9.
 Mason v. Brentini, 220.
 Massey, *re*, 281.
 Maw v. Pearson, 531.
 May v. Selby, 127.
 Mayor of London, *Ex parte*, 661,
 664, 690.

M'Cullagh, Carson v., 555.
 Mennin, Thomas v., 87.
 Merchant Banking Co. v. Spotten,
 327.
 Merchant Taylors' Co., *In re*, 374,
 389, 407, 500, 501, 504, 673.
 M'Donnell, O'Rorke v., 84, 563,
 590.
 M'Evoy, Byrne v., 90, 148, 150,
 563.
 M'Gowan v. Middleton, 261.
 M. G. W. Ry. Co., *In re*, *Ex parte*
 Lord Dillon, 465, 466.
 M. G. W. Ry. Co., Kerr v., 11.
 Mid. Ry. Co. v. Pye, 26.
 Middleton, M'Gowan v., 261.
 M'Namara v. Malone, 396, 424,
 650.
 Monroe, Atty.-Gen. v., 102.
 Moody v. Stewart, 601.
 Moore v. Alwill, 229.
 Moore v. Durden, 26.
 Morgan v. Gray, 2, 44, 56, 57, 59.
 Morris, Coughlan v., 563.
 Morrison v. Salmon, 133.
 Morrison v. Summers, 176, 177.
 Morse, Ward v., 260, 682.
 Myers v. Defries, 219, 221, 563.

N

Neale v. Clarke, 220, 260.
 Neate, *In re*, 242.
 Nethercote, Attorney-General v.,
 525, 526.
 Newborough (Lord), Stephens, v.,
 126, 159.
 Newbould v. Bailward, 528, 536,
 548, 552, 630.
 Newbould, *In re*, 435, 483, 485,
 486, 490.
 Newcastle (Duke of), Jackson v.,
 139.
 Newman, *In re*, 242, 244.
 Newport C. Co., Yorkshire W. Co.,
 v., 215, 216.
 Nicholls' Trust Estates, *In re*, 465,
 466.
 Nolan, Trench v., 137, 142, 156,
 159, 162, 182, 183, 184, 473.
 Noright, Goodright (deceased Ste-
 venston) v., 175, 178.
 N.-W. Ry. Co., Crowder v., 68, 70.

O

Oakes, Baker *v.* 198.
 O'Connor, Haslam *v.*, 126, 137,
 159, 162, 164.
 O'Connor, Hickey *v.*, 167, 169,
 170, 171.
 O'Connor, Power *v.*, 99.
 O'Donnell *v.* Callanan, 563.
 O'Farrell *v.* Cloran, 232.
 O'Hagan, *Ex parte*, 654, 655, 656.
 O'Hagan, *In re*, 495, 498, 499, 505.
 Olive, the, 30.
 Olive, Severn *v.*, 127.
 O'Loghlin, Cassidy *v.*, 208, 228.
 Olpherts, *ex parte*, *In re*, Bann
 Navigation Act, 390, 393, 495.
 Original Hartlepool Coll. Co. *v.*
 Gibb, 220.
 O'Rorke *v.* McDonnell, 84, 563, 590.
 O'Sullivan *v.* D. W. W. Ry. Co., 80.
 Owens *v.* Vamhomrigh, 84, 563.
 Oxford (Lord), Alsop *v.*, 159.

P

Padley *v.* Camphausen, 208.
 Palmer *v.* Garrett, 79, 80, 83, 89,
 561, 567, 568, 574, 583.
 Parker, *In re*, 319, 389, 390, 392,
 393, 421.
 Parker *v.* Blenkhorn, 528, 536, 655,
 669, 670, 673.
 Park, *In re*, 624.
 Parr *v.* Lillycrap, 75, 571, 573, 594.
 Parsons *v.* Tinling, 208.
 Patten, Hamilton *v.*, 64.
 Patterson, Griffiths *v.*, 681, 682.
 Pearse *v.* Lindsay, 102, 143, 159.
 Pearson, Maw *v.*, 531.
 Peel, Hill *v.*, 109, 112, 113, 156,
 184.
 Pegler *v.* Gurney, 112, 113, 156,
 184.
 Perry, Beard *v.*, 563, 592.
 Petherick, Harris *v.*, 207.
 Phelan *v.* Johnson, 584.
 Pilgrim *v.* Southampton & D. Ry.
 Co., 37, 127.
 Poland, Rex *v.*, 171.
 Pooley *v.* Driver, 197.
 Poor Law Commsrs. *v.* Fitzgerald,
 126.
 Powell *v.* Atlantic Steam Co., 20, 68.

Power *v.* Hoey, 99.
 Power *v.* O'Connor, 99.
 Price, Malins *v.*, 109.
 Pringle *v.* Gloag, 345.
 Proctor, Falls *v.*, 189.
 Pugh, *Re*, 242, 244.
 Pye, Mid. Ry. Co. *v.*, 26.
 Pyner, Dixon *v.*, 317.

Q

Quane, Frazer *v.*, 84.
 Quin, Garratt *v.*, 313.

R

Raggett, James *v.*, 6, 9.
 Raymond *v.* Lakeman, 281.
 Rayner, Saffron Walden, &c., Co.
v. 369.
 Reade, Dyott *v.*, 182, 637, 638, 640.
 Reilly *v.* White, 20.
 Ren. Leas. Conv. Act, *ex parte*
 Keatinge, 93.
 Rex *v.* Poland, 171.
 Reyworth, Galloway *v.*, 36.
 Richardson, Tisdall *v.*, 650.
 Richards *v.* Bluck, 75, 563, 571,
 583, 587.
 Riches, Abud *v.*, 650.
 Rimner, Freer *v.*, 97.
 Robb *v.* Connor, 159, 160, 162,
 165, 442, 473, 555, 637.
 Robertson, *In re*, 421.
 Roberts, Stanford *v.*, 248, 292, 293,
 296, 298, 299, 300, 301, 305, 317,
 318, 374, 389, 495, 496, 500, 501,
 502, 504, 506, 525, 633, 656, 669,
 670, 673.
 Royal Insurance Co. *v.* Lonergan,
 555.
 Royal Irish Insurance Co. *v.*
 Staines, 346.
 Ruth *v.* Keefe, 452, 453, 454, 456.
 Ryan *v.* Fraser, 459, 563.

S

Saffron Walden, &c., Co. *v.* Rayner,
 369.
 Salmon, Morrison *v.* 133.
 Sandes *v.* Cook, 596.
 Sandford and Coyle *v.*, 57.
 Saner *v.* Bilton, 220, 457.
 Sargent, Frean *v.*, 390.

Scott, Bennett v., 134, 169, 170,
 171, 208.
 Seaman, Crosse v., 88, 563, 573.
 Sedgwick, Chatfield v., 219, 220,
 221, 222, 260.
 Selby, May v. 127.
 Severn v. Olive, 127.
 Sheriff, Farr v., 64.
 Shiels v. G. N. Ry. Co., 68.
 Shrapnel v. Laing, 453, 456, 457,
 458, 459, 460, 463, 563, 682.
 Shuttleworth v. Cocker, 134.
 Sichel v. Borch, 20, 70.
 Smart v. Verdon, 160.
 Smith v. Baker, 137.
 Smith v. Barry, 473.
 Smith v. Buller, 159, 610, 611.
 Smith, Claridge v., 170.
 Smith v. Effingham (Earl of), 144,
 159.
 Smith, Gathercole v. 260.
 Smith v. Harnor, 565, 585.
 Smith, Horlock v., 310.
 Smith, Williams v., 26
 Smyth, *Ex parte*, 224.
 Southampton & D. Ry. Co., Pil-
 grim v., 37, 127.
 Southampton and Tamworth Cases,
 112, 113, 156, 184.
 South Devon Ry. Co., Brooking v.,
 224.
 South E. Ry. Co., Williams v., 216,
 Speeding v. Young, 36.
 Spittal, Jackson v., 68.
 Spotten, Merchant Banking Co. v.,
 327.
 Staffordshire Bank v. Emmott, 314.
 Staines, Royal Irish Insurance Co.
 v., 346.
 Staines, Capel v., 176, 177.
 Stamford (Earl) v. Dawson, 189.
 Stanford v. Roberts, 248, 292, 293,
 296, 298, 299, 300, 301, 305,
 317, 318, 374, 389, 495, 496,
 500, 501, 502, 504, 506, 525, 633,
 656, 669, 670, 673.
 Staples v. Young, 220.
 Staunton v. Baring, 159.
 Stevens, Holman v., 179.
 Stevenson deceased, Goodright v.
 Noright, 175, 178.
 Stephens v. Newborough (Lord),
 126, 159.

Stewart, Moody v., 601.
 Strange, *Ex parte*, 656.
 Stratton, Cottrell v. 197.
 Stooke v. Taylor, 220, 259, 461.
 Summers, Morrison v., 176, 177.
 Strother, *Ré*, 310.

T

Tamworth and Southampton Cases
 112, 113, 156, 184.
 Tattan v. G. W. Ry. Co., 11, 12.
 Taylor, Gaunt v., 63.
 Taylor, Stooke v., 220, 259, 461.
 Tetley v. Wanless, 313.
 Thomas, Griffith v., 398.
 Thomas v. Mannix, 532, 555.
 Thomas v. Mennin, 37.
 Thornton v. Greene, 654.
 Throckmorton v. Crowley, 41.
 Tinling, Parsons, v., 208.
 Tisdall v. Richardson, 650.
 Tobin, Jones v., 36.
 Toplis v. Grane, 64.
 Trench v. Nolan, 137, 142, 156,
 159, 162, 182, 183, 184, 473.
 Tucker, Legge v., 11, 12, 84.
 Tucker, Wilson v., 436.
 Turnbull v. Janson, 610.
 Tyler, Boulding v., 563.
 Tyne Improvement Commissioners,
 Clarke v., 37.

U

United Telephone Co, Wheeler v.,
 563, 570, 590.

V

Vane, James v., 563.
 Vanhomrigh, Owens v., 84, 563.
 Vaudrey, *Ex parte*, 224.
 Vaughan, Heffernan v., 636, 637.
 Vavasseur v. Krupp, 261.
 Verdon, Smart v., 160.

W

Walker, Dixon v., 563, 592.
 Walsh v. Walsh, 75, 77, 79, 80, 84,
 88, 562, 566, 567, 568, 574,
 575, 580, 588, 589, 590, 595.
 Wanless, Tetley v., 313.
 Ward v. Eyre, 244, 292.

Ward v. Morse, 260, 682.	Williams v. Smith, 26.
Watson v. Atlantic Royal Mail Steam Packet Co., 20.	Williams v. South E. Ry. Co., 216.
Welchman, <i>Re</i> , 242, 244.	Wilson, <i>In re</i> , 303, 488, 673.
Wells, <i>In re</i> , 365.	Wilson v. Tucker, 436.
Whaley, Hurst v., 2.	Winterfield v. Bradnum, 461.
Wheatcroft v. Foster, 601, 602, 603, 604.	Wright v. Hale, 228.
Wheeler v. United Telephone Co., 563, 570, 590.	Y
White, Reilly v., 20.	Yates v. Jack, 139.
Wicklow Heirlooms Case, 596.	Young, Speeding v., 36.
Wigens v. Cook, 398, 400.	Young, Staples v., 220.
	Yorkshire W. Co. v. Newport C. Co., 215, 216.

REPORTED CASES ON COSTS.

GUINEA v. ALLEN.

Com. Pleas.
1867.

(By permission, from I. R. 1 C. L. 331; s. c. 1 Ir. L. T. 6.)

JAN. 11.

Costs—Unnecessary Motion for Leave to Reply.

Where there are two replications filed to a plea, one of which merely takes issue on the truth of the defence, and the issue on the other is decided adversely to the plaintiff, the costs of the replications and motion for leave to reply will not be allowed to the plaintiff, though successful in the action.

THIS was a motion on behalf of the defendant that the Taxing Master be directed to review his taxation of plaintiff's costs, so far as related to the costs of the motion for leave to file plaintiff's replications, and all costs charged by the plaintiff incidental to the said replications.

The action was on a promissory note by payee against maker, and the defendant pleaded the acceptance by the plaintiff of a subsequent promissory note, to which there were additional parties, in accord and satisfaction. To this plea the plaintiff, on motion, obtained leave to plead two replications—one traversing the acceptance of the subsequent note in accord and satisfaction, the other alleging fraud. The jury found for the defendant on the question as to fraud; but on the other issue the finding was in favour of the plaintiff, who accordingly succeeded in the action. The Taxing Master allowed the plaintiff the costs of the replications and of the motion for leave to file them.

Dowse, Q.C., and Collins, in support of the motion:—

The plaintiff is not entitled to these costs; but for the replication of fraud, which has been found against the plaintiff, no replications, or motion for leave to file them, would have been necessary. *Blackmore v. Higgs* (1) shows that the right to costs is to be determined by the result. It was held there that plaintiff

(1) 18 C. B. N. S. 790.

Com. Pleas.
1867.

could not better his title to costs, because to a count for assault, &c., in which he succeeded, he joined in his action an unfounded claim of title to land. The result of *Morgan v. Gray* (1) is, that a plaintiff, though he succeeds generally in the action, is not entitled to such costs as were occasioned exclusively by issues on which he failed.

They also referred to *Bird v. Higginson* (2) and *Hurst v. Whaley* (3).

Murphy, Q.C., and *O'Riordan*, for the plaintiff:—

It was counsel's duty to apply for leave to reply fraud in addition to denying the acceptance of the second note in accord and satisfaction, and the Court gave leave to file these replications. Under the sixtieth section of the Common Law Procedure Act, 1853, they may be entitled to the costs of the issue of fraud unsuccessfully raised by us; but we are entitled to the costs of the cause.

[MONAHAN, C.J.:—If to a count on a bill of exchange you plead that you did not indorse the bills, and also that you had no notice of dishonour, and you succeed on the first issue, but fail on the second, you must pay the costs of that issue. Are you, or are you not, to pay the costs of the plea?]

It has never been held that when a defendant pleaded several pleas and only succeeded on one he was not entitled to the costs of the motion for leave to plead double. We say that they are only entitled to the costs of trying the issue on which they succeeded; we could not have filed even a single replication without leave: Common Law Procedure Act (1853), section 57.

MONAHAN, C.J.:—

In this case the costs in dispute are the costs of a motion for leave to reply. The replication on which plaintiff succeeded being simply a traverse of the truth of the plea, if the plaintiff had relied on that alone there would have been no occasion for the motion. From his instructions, it was probably quite right and prudent for counsel to have advised the application for leave to

(1) 10 Ir. Jur. N. S. 336.

(2) 5 A. & E. 93.

(3) 5 Ir. L. R. 429.

reply fraud; but the jury having negatived this allegation, it must be taken that the replication ought not to have been filed. The case, then, is this:—To the plea the plaintiff had a good answer and a bad one, and if she had rested on the good one there would have been no occasion for the motion. The plaintiff is not entitled to these costs, and we must therefore comply with the motion.

Com. Pleas.
1867.

CHRISTIAN, J., and O'HAGAN, J., concurred.

Attorney for the plaintiff: *C. J. Daly.*

Attorney for the defendant: *G. W. Allen.*

TALBOT v. TALBOT; TALBOT v. KENNEDY.

Chancery.
1867.

(By permission, from 1 Ir. L. T. 44)

Feb. 2.

Taxation—Costs as between Attorney and Client—Costs against Fund.

THIS was a motion on behalf of Mrs. Charlotte Talbot, that the Taxing Master might be directed to review the taxation of her costs in these matters.

It appeared that there had been a long litigation between the different members of the Talbot family in reference to their respective claims on the Castle Talbot Estate in the County of Wexford, in the course of which Mrs. Charlotte Talbot sought to establish her right to a jointure and an annuity *in presenti*, and a reversionary interest expectant on the death of Mr. John Talbot, a minor. This litigation was ultimately brought to an end by a decree, dated the 18th day of June, 1864, the result of a compromise between all the parties, by which Mrs. Charlotte Talbot's right to her jointure was established, she relinquishing all claim to the annuity and the reversionary interest. The decree declared that Mrs. Charlotte Talbot and certain other parties were entitled to the costs incurred by them in these suits, and also in the matter of *Rorke v. Talbot*, "all said costs to be taxed between party and party, save the said Charlotte Talbot's costs, which are to be taxed between solicitor and client;" and the decree further declared Mrs. Charlotte Talbot entitled to her costs in these suits as between solicitor and client, and a provision was thereby made that these

Chancery.
1867.

costs should be paid from a fund to be raised by a mortgage of the Castle Talbot Estate.

The Taxing Master, upon the taxation of costs under this decree, refused to allow Mrs. Charlotte Talbot a larger sum for the costs of a motion in *Rorke v. Talbot* than a fixed sum, which, upon the hearing of the motion, had been ordered to be paid to her by the Receiver in the cause for these costs. He also taxed her costs in these suits as costs between solicitor and client against a fund belonging to an adverse party, and not as full costs between solicitor and client, as they would be taxed when payable by the client.

Pierce Creagh and *G. O. Malley*, in support of the motion.

O'Hara, Q.C., and *J. Harris*, *contra*.

The COURT (1) held that the Taxing Master had taxed the general costs upon a correct principle; but that in taxing the costs of the motion in *Rorke v. Talbot* the same principle should have been observed, and that the amount of these costs was not restricted to the sum fixed by the order. As it would not be worth while to refer back the costs to the Taxing Master upon this point only, Mrs. Talbot should be declared entitled to the difference between this fixed sum and the amount which those costs would have been properly taxed to, which could be settled by agreement between the solicitors for the parties.

Solicitor for Mrs. Talbot: *Simon Creagh*.

Solicitor for the other parties: *W. C. Hogan & Sons*.

(1) BREWSTER, L.J. (who sat for the Lord Chancellor):—

The motion had been made in the first instance in the Rolls, but the Master of the Rolls refused to entertain it, as he had been engaged as Counsel in these suits when at the Bar.

ATKINSON v. GREGORY.

Queen's Bench.
1867.

(By permission, from 1 Ir. L. T. 157.)

Feb. 14.

(Before O'BRIEN, J.)

Costs—Taxation—Settlement of Action within Six Days of Service of Summons and Plaintiff.

In this case plaintiff had obtained an order to substitute service. Within six days of the substituted service the defendant tendered the sum due, and £2 10s. for costs, under 1st General Order, 22nd Jan., 1856.

Coppinger now moved that the Taxing Officer might be directed to tax plaintiff's costs of the motion to substitute service, and submitted that such costs are not covered by the General Order. Plaintiff cannot proceed in the action after tender of the sum due, and £2 10s. for costs, so that this motion is necessary. He wants an order under 34th section of 16 & 17 Vic., c. 113, C. L. P. Act.

O'BRIEN, J.:—

I cannot make such an order. The General Order is express that £2 10s. should be sufficient in all cases. Section 34 of the C. L. P. Act applies to cases where there may be a taxation of costs in the cause. Here there can be no taxation at all.

*Motion refused.**J. Doyle*, attorney for plaintiff.

LINDSAY v. CROTTY.

Com. Pleas.
1867.

(By permission, from I. R. 1 C. L. 731; s. c. 1 Ir. L. T. 280.)

April 27.

Money lodged in Court by the defendant, drawn out by the plaintiff on account, and subsequently taken by him in satisfaction of his demand—Defendant's Costs subsequent to Lodgment of Money in Court.

The defendant in an action lodged money in Court in satisfaction of plaintiff's demand; and, on the same day on which he served notice of the lodgment of the money, served notice of motion to change the venue.

The plaintiff took out the money on account, and subsequently elected to take the money so lodged in Court in satisfaction of his demand.

Com. Pleas.
1867.

Held, that the plaintiff must pay to the defendant his costs, necessarily and properly incurred subsequent to the lodgment of the money, including the costs of the motion to change the venue.

MOTION, that the plaintiff pay to the defendant his costs incurred subsequent to the lodgment of money in Court by the defendant, on the 22nd February, 1867. The money in this case was lodged in Court, and notice of such lodgment given on the 22nd February, and notice of motion to change the venue was served on the plaintiff on the same day. The motion to change the venue came on on the 26th February, and the plaintiff appeared on the motion; at his instance it was postponed. On the 8th March the money lodged was drawn out by the plaintiff *on account* of, not in discharge of, his claim. The plaintiff subsequently elected to take the money lodged in satisfaction of his demand. The costs of the venue motion were all that had been incurred by defendant.

Bewley, in support of the motion, referred to *Hartley v. Bateson* (1), *James v Raggett* (2), *Brown v. Julian* (3).

Meldon, contra:—

The English practice is different, because in England, when money is paid into Court the plaintiff has an opportunity of exercising an election, as he must reply either that he takes the money in full satisfaction, or that it is insufficient; but here the

(1) T. R. 629.

(2) 2 B. & AL. 766.

(3) C. P. Jan. 11th, 1867. The defendant had pleaded an issuable plea, and after issue joined and notice of trial served, had applied for leave to withdraw the plea and pay money into Court. On this motion an order was made allowing him to do so, on the terms of his paying the costs of the motion if the plaintiff did not accept the sum so paid in, the order to be without prejudice to the plaintiff's notice of trial. This order was made and the money paid into Court on Friday, November 23rd. The case was the last in list of common jury cases, the sittings for which were to commence on the following Tuesday. The plaintiff drew out the money in satisfaction of his claim on Saturday, the 24th November, but did not give the defendant notice of his having done so, or withdraw notice of trial until Monday, 26th. The motion before the Court was that the plaintiff be allowed all costs incurred after the money had been paid into Court, and before notice of trial was withdrawn. The Court ordered that all costs necessarily and properly incurred by the defendant, up to the service of the notice withdrawing notice of trial, should be taxed and set off against the plaintiff's costs in the cause, and that the plaintiff should pay to the defendant £4, costs of the motion. [S. c. Ir. L. T. 156.—G. Y. D.,].

costs sought are those of the venue motion, the notice for which was served along with that of lodging the money.

Com. Pleas.
1367.

MONAHAN, C.J. :—

We entertain no doubt in this case: On the 22nd February the money was lodged in Court by the defendant. The plaintiff, on receiving notice of the lodgment of the money, may either draw it out in satisfaction of his claim or on account. Here the plaintiff draws the money out on account, and when the motion for changing this venue came on, he appeared and obtained a postponement. Drawing out this money on account, left the plaintiff the power and right of proceeding with the action. If he had proceeded, and there had been a verdict against him, he would have paid the whole of defendant's costs. Instead of going on with the case he subsequently chose to change his mind and take the money lodged, which he had drawn out on account on the 8th of March, in full satisfaction of his cause of action.

The defendant is entitled to any costs properly incurred by him after the money was lodged. He had incurred the costs of the venue motion, and must get them, as he would under the judgment of the Court, if the case had gone on and the sum lodged had been found sufficient (1).

Costs of motion to change the venue and of this motion to be set off against plaintiff's costs, and balance, if any, to be paid to defendant.

Leave to go on with the action refused.

Attorney for plaintiff: *J. Meldon.*

Attorney for defendant: *J. D. Bergin.*

(1) In England the defendant would appear never to get the costs up to the lodgment of the money, even if he succeed, but in Ireland the rule seems otherwise. See Sec. 78 of the Common Law Procedure Act, and the case of *Farmer v. Fottrell*, 8 Ir. C. L. R. 228.

Ecchequer.
1867.

May 6.

QUIN v. GRAY.

(By permission, from I. R., 1 C. I., 223.)

Practice—Costs—Costs incurred after Money is paid into Court—Unnecessary delay in drawing out Money.

B, being sued by A for the sum of £32 for goods delivered, on the 18th December filed his defence, paying £29 into Court, and alleging that the goods were worth no more. On the 21st December, B served notice of motion to change the venue, which motion was movable before a Judge in Consolidated Chamber on the 4th January.

On the 3rd January the plaintiff's attorney wrote to the defendant's attorney that the petitioner would take the money out of the Court in satisfaction of his demand. This letter was received on the 4th, and a telegram sent to Dublin to stop the motion, which, however, arrived after the motion had been made. The defendant was held entitled to the costs of the motion, but not to the costs of the affidavits on which it was grounded.

IN this case the action was to recover £32 for goods sold and delivered. The writ of summons and plaint was issued on the 30th of November, 1866, and served on the 4th of December. A defence was filed on the 18th of December, and £29 paid into Court, the defendant averring that the goods were not worth more than that sum. On the 21st of December the defendant's town agent served on plaintiff's town agent a notice of motion to change the venue. The motion was movable on the 4th of January, and was moved on that day; there was no appearance for the plaintiff, and the motion was granted, but no order was made as to costs. On the 3rd January the plaintiff's attorney had written a letter to the defendant's attorney, who resided in Belfast, announcing his intention to take the £29 out of Court. This letter was received by the defendant's attorney on the morning of the 4th, and a telegram was sent to his Dublin agent to stop the motion, but it arrived too late.

The defendant now moved that the Taxing Officer should be directed to tax his costs incurred after the payment of the money into Court and that the plaintiff might be ordered to pay them to the defendant.

Weir, in support of the motion:—

Exchequer.
1867.

We are entitled to our costs incurred after the money was paid into Court. The defence was filed on December 18th, and the plaintiff lay by, and suffered us to incur the costs of a motion, without giving us any notice that he intended to take the money out of Court until the 3rd January, although he was served with our notice of motion on the 21st of December. *James v. Raggett* (1); *Davis v. Mansell* (2); *Kelly v. Flint* (3).

Even admitting that we were too soon in serving our notice of motion, and that we cannot get the costs of our affidavits for the motion we certainly ought to get the costs of our motion itself. The Court of Common Pleas has given them in a similar case a few days ago: *Lindsay v. Crotty* (not yet reported).

Ante, p. 5.

Monroe, for the plaintiff, *contra*:—

The defendant ought not to have taken any steps in the action until the plaintiff gave him some notice of his intention to proceed. He ought to have waited until notice of trial was given. He might have concluded that the plaintiff would not have gone to trial for £3. These costs cannot be said to be reasonably and properly incurred. The defendant can have no claim to the costs of the notice and affidavits, which were incurred only two or three days after the defence.

FITZGERALD, J.:—

The only question is, whether the costs were reasonably and properly incurred. I think that, seeing that the plaintiff had ten days after the receipt of the defendant's notice within which to announce to the defendant his intention to take the money out of Court, the defendant was justified in proceeding with his motion, and we must hold him entitled to his costs of the motion, but not of the affidavits, as the notice of December 21st was too soon.

HUGHES, B., *concurred*.

Motion granted, with costs.

Attorneys for plaintiff: *M·Lean* and *Boyle*.

Attorney for defendant: *J. Dinnen*.

Queen's Bench.
1867.

LANG v. EAKIN.

Nov. 5.

(By permission, from 1 Ir. L. T. 631.)

Costs—Taxation—Submission to Arbitration—Parties living within the same Civil Bill Jurisdiction.

MOTION for an order that the Taxing Master should review his taxation of plaintiff's costs, and disallow the whole of such costs.

The action was brought for breach of covenant in an indenture of apprenticeship. The matter was, by consent (which was made a rule of Court), referred to arbitration, and in the consent it was provided that judgment should be marked for such sum as the arbitrators should award, together with such costs as thereafter mentioned, "with costs only in case of their finding being for the defendant; that the costs of the action, consent, and award, and making same respectively rules of Court, should abide the result of the award; that the plaintiff should be entitled thereto if the award should be in favour of the plaintiff for any sum of money, and that the defendant should be entitled thereto if the award should be in favour of the defendant."

The arbitrators awarded that a sum of £15 should be paid by the defendant to the plaintiff as damages in respect of the subject matter of the action, and the award was made a rule of Court.

The parties lived within the same civil bill jurisdiction.

The Taxing Master allowed the plaintiff full costs.

Mills, for the defendant, in support of the motion.

Palles, *Q.C.*, and *Dames* for the plaintiff.

The COURT refused the motion with costs, holding that on the construction of the submission the parties had contracted themselves out of the operation of the 97th section of the Common Law Procedure Act of 1856, and that the question as to the scale on which the costs were to be taxed did not arise on the frame of the notice of motion.

Attorneys for the plaintiff: *Tisdall* and *Twibill*.

Attorney for the defendant: *John Swanzy*.

O'SULLIVAN v. THE DUBLIN AND WICKLOW
RAILWAY COMPANY.Com. Pleas.
1867.

Nov. 7.

(By permission, from I. R. 2 C. L. 124; s. c. 1 Ir. L. T. 675.)

Action against Carriers—Cause of Action not “disconnected with Contract.”

In an action against carriers, though the plaintiff frame his plaint in tort, the action will not be considered to be grounded on a wrong disconnected with Contract, so as to entitle him to full costs under the 243rd section of the Common Law Procedure Act (Ireland), 1853.

In this case the first count complained that the defendants were carriers for hire from Enniscorthy to Dublin, and received certain goods of the plaintiff to be safely carried and delivered, and safely kept for the plaintiff while in their custody, for reward to be paid to the defendants by the plaintiff. Yet they did not safely carry or deliver the goods; nor while they were in their custody for the purpose aforesaid, take due and proper care of them.

Second count in trover.

Third count in detinue.

The plaintiff obtained a general verdict for £17. On this finding the Taxing Master only allowed half costs on the ground that the cause of action was not one “disconnected with contract” within section 243 of the Common Law Procedure Act, 1853. The motion before the Court was to review the Taxing Master's decision.

P. Keogh, in support of the motion:—

In *Kerr v. Midland Great Western Railway Company* (1), which will be relied upon on the other side, there was no count in trover; and that case was decided before *Tattan v. Great Western Railway Company* (2), which decided that an action against a carrier for breach of duty in not safely carrying was an action of tort in substance as well as form; there we have got a verdict on the count in trover which is one of pure tort. *Legge v. Tucker* (3) was a case of contract.

(1) 10 Ir. C. L. Ap. 54.

(2) 2 E. & E. 844.

(3) 1 H. & N. 500.

Com. Pleas.
1867.

Piers White, contra:—

In *Legge v. Tucker* (1), Pollock, C.B., says:—"Where the foundation of the action is contract, in whatever way the declaration is framed, it is an action of assumpsit." In *De Vesci v. London and North Western Railway Company* (2) there were counts in trover and detinue as here. In *Hearne v. Lancashire and Yorkshire Railway Company* (3), *Tattan v. Great Western Railway Company* (4) was referred to, and the distinction was taken that in the corresponding section of the English Act the words "disconnected with contract" do not occur. That case was decided on the 19 & 20 Vict. c. 108, sec. 30. The forms of action still exist in England, but are abolished here, and the foundation of this action was in contract.

MONAHAN, C.J. :—

This question does not depend on the form of the pleadings. The only intelligible rule is, that where the *foundation* of the action is in contract, express or implied, the plaintiff should be entitled only to half costs, if the sum recovered be less than £20. The goods were originally delivered to be carried; the violation of that obligation would entitle the plaintiff to maintain an action of assumpsit; and the fact that the plaintiff grounds his claim on a breach of duty, not a breach of contract, and joins a count in trover, does not change the nature of the original cause of action, which is not disconnected with contract within the 243rd section of the Common Law Procedure Act; and therefore the plaintiff is entitled only to half costs.

Motion refused.

Attorney for plaintiff: *E. H. Hunter.*

Attorney for defendant: *G. Keogh.*

(1) 1 H. & N. 500.

(3) 7 Ir. Jur. N. S. 378.

(2) 10 Ir. Jur. N. S. 21.

(4) 10 Ir. Jur. N. S. 21.

MAGUIRE v. O'CONNOR.

Com. Pleas.
1867.

(By permission, from 1 Ir. L. T. 702.)

Nov. 7.

(Coram MONAHAN, C.J., and O'HAGAN, J.)

Taxation of costs between Attorney and Client when paid under consent by a third party submitting to a verdict.

THIS was a motion involving, amongst other matters, a question as to the amount of costs due by the plaintiff to his attorney in the case of *Maguire v. O'Connor*, in which the defendant had submitted to a verdict, and paid costs between attorney and client.

The plaintiff's attorney alleged that he was entitled, as against his client, to a larger sum for costs in that action than Master Colles had taxed against the defendant under the consent for judgment, as Master Colles in such a case should not tax certain costs when they were to be paid by a third party, though he would if they were to be paid by the client.

Master Colles, having been referred to, said he had taxed the costs upon an intermediate scale—that is, intermediate between party and party, and that which he would allow if taxing the costs of the attorney against his own client. The principle of the intermediate scale which he applied to such taxation when the costs were to be paid by a third party was that a client may wish things to be done which put his attorney to a great deal of unnecessary expense and trouble, but which the client may insist upon having done, which accordingly it was quite right he should pay for; but when a third party was to pay costs between attorney and client he did not tax them.

MONAHAN, C.J. :—

The costs having been taxed against the defendant in *Maguire* and *O'Connor*, on the principle explained by Master Colles, which seems quite right, must now go back to be taxed again as between Mr. Maguire and his attorney.

For support of motion: *Burke, Q.C., and Lery.*

Attorney: *J. H. Ramsay.*

Against motion: *P. Keogh.*

Attorney: *Hunter.*

Exchequer.
1867.MAPE v. LONDON AND NORTH WESTERN RAILWAY
COMPANY.

Nov. 12.

*(By permission, from I. R. 1 C. L. 563.)**Practice—Public Company—Service of Writ.*

A plaintiff, having obtained an order to substitute service against a corporation aggregate is not entitled to the costs of advertisements inserted in Irish papers, under the provisions of the 33rd section of the Irish Common Law Procedure Act, unless the order for substitution of service directs such advertisements.

THIS was an appeal from a decision of Master Colles, on taxation of the plaintiff's costs in this case. The plaintiff obtained a substitution of service on the defendants by a Judge's order, directing service on John Roberts, the agent at Dublin of the defendants, and sending a copy by post of the said writ and order to the head office of the company in London; he also had advertisements inserted in the "Dublin Gazette" and the "Irish Times," and the question in dispute was, whether he was entitled to the costs of these advertisements.

Keogh, in support of the appeal:—

The provisions of the 34th section as to substitution of service do not do away with the necessity for complying with the 33rd section. The advertisement provided for in that section is not a part of the service. The policy of the Act is to give notice to the shareholders, and that applies whether service is substituted or not. In all the cases referred to in the 33rd section the word used is "officer." But in the proviso the words are "officer or agent," and "agent" is the term used in the 34th section.

Armstrong, Serjeant (with him *W. Boyd*), in support of Master Colles' ruling:—

Occasionally these costs have been allowed when no question was raised about them; but whenever the question has been raised Master Colles has decided against allowing them.

Keogh, in reply.

FITZGERALD, B. :—

Exchequer.
1867.

We think the decision appealed from was right. The 33rd section deals with a particular class of cases which it specifies, and it provides certain modes of service in those cases, in order to render the service effectual. That provision does not apply to any but that class of cases, though it might be a very proper provision to be added to the order in cases coming within the 34th section.

DEASY, B., concurred :—

The provision only applies to those cases where the shareholders would be likely to get information from an Irish newspaper. In the present case service was substituted on an English company. We must refuse the motion, but without costs.

Attorney for the plaintiff: *Thomas J. White.*

Attorneys for the defendants: *Cullen, Coffey & Co.*

IN THE MATTER OF THE 11 & 12 VICT., C. 68; AND
IN THE MATTER OF THE TRUSTS OF THE WILL
OF SARAH BOYD.

Rolls.
1867.

Dec. 7, 11.

(*By permission, from I. R. 1 Eq. 489; s. c. 1 Ir. L. T. 731.*)

Trustee Relief Act—Amount of Costs to be allowed to Trustees lodging Fund.

In future the sum allowed to trustees for the costs of lodging money under the Trustee Relief Act in ordinary cases will be £8.

THE surviving trustee of the will of Sarah Boyd lodged two sums of £950 and £650 to the credit of this matter without having deducted the costs of the affidavit and lodgment from the trust fund. The money was bequeathed in trust for one for life, and after his death in trust for other persons in certain shares.

Mr. Faloon, in moving on behalf of the tenant for life for an order for payment of the dividends, asked for the trustee's costs of the affidavit and lodgment of the funds.

Rolls.
1867.

THE MASTER OF THE ROLLS said:—

He would request the Taxing Masters to state to him what would be a proper sum to be deducted for their costs by trustees lodging money under the Trustee Relief Act; and on a subsequent day, December 11, his Honor said that the Taxing Masters had certified to him that £8 would be a reasonable sum in ordinary cases. Except in very special cases, he should allow no more than that sum in future.

Solicitors for the petitioners: *Messrs. Lestrangle & Brett.*

Admiralty.
1869.

Jan. 8.

THE "QUEEN."

(By permission, from 3 Ir. L. T. 101.)

Appraisement subsequent to sale—Marshal's Expenses.

IN this case objections had been made to some of the claims made by the Marshal for expenses connected with the sale of this vessel, which had been sold by order of the Court. The appraisement had been made subsequently to the sale, instead of previously, and the vessel was appraised at a sum less than that for which she had been sold.

Boyd, LL D., for the Marshal.

TOWNSEND, J.:—

This question arises on the new practice, and no one, therefore, is to blame. The first item objected to is No. 5, the travelling expenses of the Marshal to Youghal and back, and No. 6, his hotel expenses, which comes under the same category. It seems that he went *bonâ fide* to attend the sale. It is so stated by Dr. Boyd, and it is not disputed. He did not arrive there in sufficient time. If the sale was not an absolute sale, there is no great ground for complaint, because the fund has been benefited by what happened, but I think still that the old practice of the Court would be preserved, and it would be competent to the party to open the bid-

dings. It is not exactly accurate to say that the opening would render the rules nugatory, because a sum is ascertained under which the sale shall not take place. I take it that notwithstanding the irregularity in having the appraisement after the sale (which was an irregularity, and I think a nullity), no objection having been made to the sale on that ground, the Marshal was justified in making over the vessel to the purchaser. If he had gone down, as was his right, to execute that commission, he would clearly be entitled to travelling and hotel expenses, and as no question has been raised as to the amount, I think it right to allow Nos. 5 and 6. No. 7 consists of fees, made up, partly, of a charge for making an inventory. I do not think the Marshal should have employed a person to make this inventory. The Marshal is an officer of this Court, and should execute this duty in person and not by deputy. Warrants may be served by substitutes, but I think it has always been the duty of the Marshal to go and superintend the process, and if unable to do so, I think he should call in some fit person to act, but he should make a special case of that kind, and I do not think I can allow this item. As to the auctioneer's expenses, it would be hard to expect that the Marshal should not have the choice of an auctioneer. I think the travelling expenses of the auctioneer from here must be allowed, but the fee for going to sell seems excessive. I will not allow more than £2 2s. as the auction fee. As to the appraisement fee of £1 12s., I do not think I ought to allow it. The Marshal first procures the sale to be made and then gets the vessel appraised. Of what use was that? It might satisfy the Marshal's mind to know that the vessel was sold for more than she was appraised at. Could I set aside the sale because of this? I will strike off the fee of £1 12s. No costs, of course.

Rolls.
1869.

CHAPPLE v. BOURKE.

Jan. 24.
Feb. 19.

(By permission, from I. R. 3 Eq., 270; s c. 3 Ir. L. T. 238)

Costs—Taxation—Case to Counsel in Undefended Suit to Advise Proofs.

In undefended suits the costs of a case to counsel to advise proofs will not be allowed on taxation between party and party, except under very special circumstances.

THE petition was filed for an apportionment of a rentcharge of £600, charged on the lands of the petitioner and the respondent, but paid exclusively out of the respondent's lands. There was no defence, and there was a decree for the petitioner, with costs. The bill of costs brought into the Taxing Master by the petitioner's solicitor contained the following items:—

	£	s.	d.
25. Draft case for Counsel to advise proofs	-	0	3 4
26. Copy for counsel	-	0	2 0
27. Paid fee to counsel	-	2	2 0
28. Attending him	-	0	6 8
	£2	14	0

The Taxing Master refused to allow the items as the case was undefended, and the petitioner moved to review the taxation as to them. The petitioner's solicitor made an affidavit, in which he stated that the proofs advised by counsel were read at the hearing, and that he believed that without such proofs the decretal order would not have been made.

Mr. R. Ferguson was heard in support of the application.

HIS HONOR said that he had inquired into the matter, and that he found that the uniform practice of the Taxing Masters was not to allow the costs of a direction of proofs by counsel as between party and party in undefended cases. He thought that the rule of the Taxing Masters was a very good one, and he should require a very special case to induce them to depart from it; and he, therefore, made no rule on the motion.

Solicitor for the petitioner: *Mr. Francis Kearney*.

CROWDER v. THE IRISH NORTH-WESTERN
RAILWAY COMPANY.Exchequer.
1869.April 28.
May 2.

(By permission, from I. R. 4 C. L. 371; s. c. 3 Ir. L. T. 465.)

Costs—19 & 20 Vict., c. 102, s. 97—Entire Cause of Action.

The 97th section of the Common Law Procedure Act, 1856, depriving a plaintiff of costs, applies only when the parties reside within the same Civil Bill jurisdiction where the *entire* cause of action has arisen.

The plaintiff, being away from the county in which he resided, contracted with a certain Railway Company which plied between the county in which he then was and his home, and had places of business in both counties, to carry certain goods home for him. The goods were lost in the transit.

Held, in an action of *assumpsit* against the Railway Company for the non-delivery of the goods, that this was not a case in which the parties resided within the same Civil Bill jurisdiction in which the *cause of action* had arisen; and that the plaintiff was not, therefore, deprived of his right to costs by the fact that he had recovered but £10 in the action.

THIS case came before the Court upon motion on the part of the plaintiff by way of appeal from the decision of the Taxing Master refusing to allow the plaintiff half costs, under the following circumstances:—The action had been brought by the plaintiff against the defendants, the Irish North-Western Railway Company, for the recovery of £100 damages, alleged to have been sustained by the plaintiff by reason of the defendants not having carried by railway (as they had contracted and agreed to do) certain timber of the plaintiff from Enniskillen, in the County of Fermanagh, where the contract was made, to Bundoran, in the County of Donegal, where, according to the contract, the timber was to be delivered.

The plaintiff resided at Bundoran, and the defendants had also a railway station, or place of business, in the said town. No defence was pleaded; and judgment having been marked by default, the case came before the Master of the Court and a jury, in pursuance of the usual notice of inquiry, to assess damages. The jury awarded the plaintiff £10 damages. As it was admitted that the plaintiff and defendants both resided *within the same Civil Bill jurisdiction*, within the meaning of the 97th section of the Common Law Procedure Amendment (Ireland) Act, 1856 (19 & 20 Vict., c. 102, s. 97), the Taxing Master, being of opinion

Exchequer.
1869.

that the *cause of action* had arisen within that jurisdiction, refused to allow the plaintiff any costs; and from this decision the present appeal, by way of motion, was taken.

M-Laughlin, for the plaintiff, in support of the motion :—

Breach of contract is a cause of action consisting of two things—viz., the contract itself and the breach; and only one of these—viz., the breach, occurred in the county where the Plaintiff resided. This section applies only where the cause of action—that is, the entire cause of action, and not a mere portion of it—arose in the county where the parties reside: see *Hurley v. Lawler* (1), which was decided upon the construction of the 40th section of the Civil Bill Act—a section which, although repealed by the Procedure Act of 1853, was re-enacted by the 97th section of the Act of 1856, now under consideration. The case of *D'Arcy v. Hastings* (2) is an authority that the section at present under consideration is to be construed in accordance with the 40th section of the Civil Bill Act.

The 18th section of the English Common Law Procedure Act of 1852 uses the expression *cause of action*, and it is held to mean “entire cause of action:” *Sichel v. Borch* (3); “Chitty’s Archbold’s Practice,” 12th Edition, 214.

Boyd, for the defendant, *contra* :—

The expression “cause of action” in the 97th section of the Act of 1856 does not mean “entire cause of action.” The same expression occurs in the 34th section of the Act of 1853 (16 & 17 Vict., c. 113), and has been held to mean “any part of the cause of action:” *Betham v. Fernie* (4); *Powell v. Atlantic Steam Navigation Company* (5); *Watson v. Atlantic Royal Mail Steam Packet Company* (6); *Kisbey v. Chester and Holyhead Railway Company* (7); *Aston v. London and North-Western Railway Company* (8); *Reilly v. White* (9).

Cur adv. vult.

(1) 6 Ir. Jur. 344.

(2) 10 Ir. C. L. R., App. xxviii.

(3) 2 H. & C. 954.

(4) 4 Ir. C. L. R. 92.

(5) 10 Ir. C. L. R., App. xlvii.

(6) 10 Ir. C. L. R. 163.

(7) 2 Ir. Jur. N. S. 330.

(8) Ir. R. 1 C. L. 604.

(9) 6 Ir. Jur. N. S. 87.

No judgment was given; but the Court, on this day, made the following order:—

Exchequer.
1869.

May 2.

It is ordered by the Court that the said Taxing Master do tax the plaintiff's cost of this cause, and allow to said plaintiff half costs; no costs of this motion on either side.

Attorney for the plaintiff: *Patrick Brady.*

Attorney for the defendants: *A. Boyd.*

FRY v. JAMES.

(*By permission, from I. R. 4 Eq. 256; s. c. 4 Ir. L. T. 162.*)

V.-C. Court.
1870.

Jan. 13.

Practice—Costs—Case to advise Proofs.

An affirmation not stating the affirmant's means of knowledge not received in evidence. Under the present practice a case to direct proofs at the hearing of a cause, where no answer has been filed, will tax as between party and party.

THIS was a motion for a decree.

The bill was filed by the trustees of the Dublin Building Association for the appointment of a receiver over the premises comprised in the mortgage to the Association, pending a sale in the Landed Estates Court.

The bill stated that the defendants were in possession and receipt of the rents and profits of the premises. The defendants entered an appearance but were not required to answer, and did not answer nor appear at the hearing. The Secretary of the Association made an affirmation which was given in evidence at the hearing, in which he stated that the defendants were in receipt of the rents and profits of the premises, but did not state his means of knowledge. That was the only affirmation or affidavit made for proof at the hearing.

Mr. F. W. Walsh, Q C., and Mr. George Foley were for the plaintiffs.

V.-C. Court,
1870.

The VICE-CHANCELLOR :—

I cannot act on this affirmation. The 153rd General Order, 1867, is express that the means of knowledge of the person making the affidavit or affirmation must be stated; and, as the plaintiff has to prove his case, the fact that the defendants have not denied the statements in the bill, which they have not been required to answer, cannot be relied on.

Mr. Foley then stated that no case for direction of proofs had been laid before the counsel in consequence of a prevalent impression that the costs of such a case would not be allowed on taxation between party and party where there was no answer, and that it was desirable for the proper conduct of causes in the several branches of the Court of Chancery that such an impression if erroneous should be set right.

The VICE-CHANCELLOR :—

There is no foundation whatever for such an impression; and it is difficult to imagine how anyone acquainted with the present practice of this Court could entertain it. I am sure that every other judge of this Court is as fully convinced as I am that a proper direction of proofs is one of the most important matters in the conduct of a suit, and that no cause should be brought into Court without having the proofs properly directed by counsel upon a case laid before him for that purpose. I shall allow this cause to stand for a fortnight, with liberty for the plaintiffs to file such other affidavits as they may be advised; but I shall not allow the plaintiffs any costs of this day.

Solicitors for the plaintiffs: *Messrs. W. Neilson & Son.*

In re MORTIMER.

Jan. 25.

(By permission, from I. R. 4 Eq. 96; s.c. 4 Ir. L. T. 87.)

Taxation of Costs—Motion to Review—New Evidence—Refresher Fee to Counsel on Motion—Fee to Solicitor for approval of a draft deed—Costs of Taxation.

An appeal from the decision of the Taxing Master will not be allowed, except on a question of principle.

The Taxing Master's decision will not be reversed on new evidence which might have been produced before him.

A refresher fee to counsel on a motion is never allowed on taxation unless it be certified by the Court.

A fee of £3 3s. *per diem* to a solicitor for attendance in the country is not allowed on taxation without a special authority of the client. A general authority is not sufficient.

A solicitor is not entitled to a fee of £2 2s. for approval of a deed where he has been investigating the title, and he gets the general costs relating to the matter which is the subject of the deed.

The rule disallowing the costs of taxation, where more than one-sixth is struck off, applies to all taxations, whether under the Solicitors' Act or otherwise.

THIS suit was instituted by summons under the 145th section of the Chancery (Ireland) Act, 1867, for the administration of the assets of Mr. David Mortimer. Messrs. Reade and Goodman, who had been the solicitors for Mr. Mortimer, brought in a bill of costs, in amount £170, before the Chief Clerk, who referred it to the Taxing Master. The Master disallowed the following items in the bill of costs :—

No. 32. Attending at Common Pleas, searching for recovery of 1808, 1812, and also deed leading the uses, 6s. 8d.

No. 33. Paid attested copies, 10s.

A number of charges for attendances and letters which the Master considered unnecessary.

Nos. 134, 135, 136, and 150, which were two fees of £3 3s. for attendances on the client at his residence in the country, at a distance of about forty-five miles from Dublin, and of a solicitor at Navan, and for railway and car fares.

Nos. 122, 153, 154, 155, four fees of £2 2s. each, for perusing and approving of draft deeds.

No. 339, a fee of £2 2s. to counsel, on a motion before Master Fitzgibbon, to discharge Mr. Mortimer from arrest.

Rolls.
1870.

The Master also disallowed the costs of taxation, more than one-sixth having been disallowed in taxation.

A motion to review the taxation as to the foregoing items having been made to the late Master of the Rolls, his Honor requested the Taxing Master to certify his reasons for disallowing the items.

MASTER COFFEY certified as follows:—"Items 32, 33. This was a charge for a search in the Common Pleas. I considered that no necessity was shown for the search. The abstract of title having been furnished by the solicitor for Mr. Mortimer, it was not required by the purchaser or solicitor, and so it appeared upon the taxation before me.

"No. 339. At item 321 in the bill of costs there is a brief and fee to counsel charged. When the motion came before the Master, incident to this brief, it was directed to stand over. In a motion so standing, counsel is not entitled to a refresher fee, without the direction of the Court, and I accordingly disallowed item No. 339.

"Nos. 134, 135, 136. These are charges connected with the attendance of the solicitor at the residence of his client in the country, for which he seeks £3 3s., together with railway charges, &c. To allow such a class of charges, the Taxing Masters require some authority or direction to be shown from the client, directing his solicitor to attend in the country out of the usual course. In this case there was no authority or direction of any kind shown. Therefore, acting on the settled practice of the Taxing Masters, I disallow these charges. For if a solicitor were allowed to make these attendances without some direction or authority, a client could be operated with a heavy liability without previous sanction or knowledge. Therefore, the Taxing Masters have held the production of an authority for such attendances to be absolutely necessary. The attendance in question would have been unnecessary, as correspondence in the usual course could be pursued by the solicitor, unless otherwise directed or authorised by the client.

"No. 150. This is another attendance by the solicitor in the country upon a solicitor to whom he had previously sent a draft deed for approval; and, not receiving it, the solicitor proceeded to the country, but without any authority from the client—the practice being that no solicitor is justified in proceeding to the

country, at an expense of £3 3s. per day, without the authority of his client; and, referring further to my reasons in the foregoing item, I disallow these charges.

“Nos. 122, 153, 154, 155. On referring to the bill of costs, it will be observed that I have allowed 2s. 6d. per skin for the perusal of these deeds, as the proper fee a solicitor is entitled to; for such duties as your Lordship will observe, are provided for under No. 144 of the schedule of the solicitors’ fees, dated the 3rd of January, 1859, and I have known of no departure from the charges so provided.”

The motion to review the taxation was now renewed, supported by an affidavit of the solicitor, which stated that the Master had disallowed the costs of taxation, in pursuance of the 10th of the regulations of the 12th of December, 1868; that he had a general authority from Mr. Mortimer, his client, to attend upon him at his residence whenever it was in his (the solicitor’s) opinion necessary to do so; and that the attendance (item 134) was an urgently necessary attendance; that item 150 was also a necessary attendance; that at the time there was a receiver over his client’s estate, at the suit of Richard Dyas, and that there were other petition matters pending, under which the receiver would have been extended; and that, in order to procure the discharge of the receiver, his client had agreed with Henry Simmonds for a loan to pay off the charges upon foot of which the petition matters had been instituted, and that part of the security for the loan was to be the assignment of the said charges—for the approval of the drafts of which assignments the items 122, 153, 154, and 155, were charged; that the procuring and approving of a draft deed entailed great responsibility on a solicitor, as he has to compare the recitals with the documents recited, and to compare the engrossment and memorial of the deed.

As to No. 32, a copy of a letter was produced, which directed the solicitor to search for the recovery.

It also appeared, as to No. 339, from Master Fitzgibbon’s ruling, that the motion had stood over for the production of further documents, which were briefed, and sent to counsel, with a fee which was disallowed.

Rolls.
1870.

Mr. J. C. Armstrong, in support of the motion:—

The evidence now before the Court shows that the items should have been allowed. As to No. 32, the copy of the letter produced shows that a search for the recovery was proper and necessary. As to the attendances in the country, the solicitor had a general authority, which he submits was sufficient to justify his going to the country to have a personal interview with the client. The approval fees should also be allowed, as the 144th item in the schedule of fees, of 1859, applies only to the perusal of an existing deed, not to the approval of the draft of the proposed deed. The costs of taxation were disallowed under the rules of December 12th, 1868, which did not exist at the time the costs were incurred. The Court will not give a retrospective effect to its order any more than it will to an Act of Parliament, unless the words of it are clearly retrospective: *The Midland Railway Company v. Pye* (1); *Moore v. Durden* (2); *Williams v. Smith* (3). The rule disallowing the costs of taxation, where more than one-sixth struck off, applies only where the costs are taxed under the Solicitors' Act.

Mr. Brady, Q.C., for the minors entitled to the surplus of the assets:—

An appeal from the Taxing Master lies only on a question involving a principle. The disallowance of an attendance is a question for the decision of the Taxing Master, not of the Court. A refresher is never allowed on a motion unless it is expressly given by the order. Approval fees are sanctioned only by the custom of the profession, and are not allowed in any schedule of fees. In practice, an approval fee is given for approval of the draft of a deed relating to a matter which comes before the solicitor for the first time, and of which he knows nothing—*ex. gr.*, a marriage settlement. In all other cases a solicitor is entitled to 2s. 6d. per skin for perusing a deed under the schedule of fees of 1859. The rule as to the costs of taxation applies to all taxations: *Adair* on costs, 273; *Downing v. Hodder* (4). A special authority from the client is always necessary to entitle a solicitor to a fee of £3 3s. *per diem* for attendance in the country.

(1) 10 C. B. N. S. 191.

(2) 2 Exch. 43.

(3) 1 H. & N. 561.

(4) 4 Ir. Ch. Rep. 37.

THE MASTER OF THE ROLLS (1):—

This is a motion that the Taxing Master may be directed to review the taxation of certain items in a miscellaneous bill of costs which was brought before him; and the minors for whom Mr. Brady has appeared are interested in resisting the motion.

The general rules upon which motions to review the taxation of costs are to be decided are perfectly settled. One rule which I entirely approve of is, that no appeal from the Taxing Master's decision will be entertained, except on a question of principle. It is also a settled rule not to act on evidence which the applicant might have produced, and did not produce to the Taxing Master. Those rules have been settled by repeated decisions. I have no discretion but to follow them, and I abide by them.

The bill of costs before me amounts to £170; the deductions amount to £46; and the costs of taxation have been disallowed, on the ground that more than one-sixth of the bill of costs has been struck off on taxation. On looking at the first part of the schedule annexed to the notice of motion, I cannot find in it any item which involves a question of principle. They are all small items at 6s. 8d. except one for 10s.; and the most of them are for attendances, and are matters for the Taxing Master, and not for the Court to decide. I cannot take upon myself to say that the Taxing Master was wrong in disallowing them. There is one item, however, which I am rather inclined to think the Master would have allowed if the document which was produced to me had been produced to him, as it ought to have been. The search for the recovery seems to have been proper, and if the item were not so small—16s. 8d.—I should regret being precluded by the rule of the Court from reviewing the taxation in that respect. But I must follow the Master's ruling.

Item 339 in the bill of costs is a second fee to counsel for attending on a motion which had been directed by the Master to stand over. No Judge could be more anxious than I am to allow a solicitor a fee *bonâ fide* paid to counsel; but it is a rule of the Court never to allow a refresher fee to counsel on a motion without the direction of the Court. That rule is observed in the

(1) The Right Honorable E. Sullivan.

Rolls.
1870.

Master's offices, and I have never known it to be departed from. What happened in this case is what happens in almost every motion which stands over. The motion was really a pending motion, and the fee to counsel was a refresher. It was so regarded by the Taxing Master, and he disallowed it. I feel myself to be in the same position as the Taxing Master—bound by the settled rules of practice to disallow this fee.

With regard to the fees disallowed for attendances in the country, the decision is rather hard upon Mr. Reade. The Taxing Master disallowed the items on the ground that in such a class of charges the Taxing Master requires some authority to be shown from the client, directing his solicitor to attend in the country; and that in this case there was no authority or direction of any kind shown. And Master Coffey adds that, "if a solicitor were allowed to make these attendances without some direction or authority, a client could be operated with a heavy liability without previous sanction or knowledge." Mr. Reade says that he had a general authority from Mr. Mortimer, his client—who died before these costs were taxed—to attend upon him at his residence whenever it was, in his opinion, necessary to do so.

I do not think that such a general authority was sufficient. If it were held to be sufficient it might be carried to an extravagant length. A solicitor might go over to England, or to the south of France, or to any part of the Continent, and put the client to very great and comparatively useless expense. I, therefore, agree with the Taxing Master, and shall hold that something more than a loose general authority is necessary to justify a charge of £3 3s. a day for attendance on a client in the country, particularly when correspondence might effect the same object.

The only remaining question is as to the approval fees, which were disallowed by the Taxing Master. I was at first much struck by the observations of Mr. Armstrong, that the decision of the Taxing Master invaded the established practice under which a solicitor gets an approval fee of two guineas for a draft deed. But it is evident from the report that Mr. Coffey did not intend to infringe on that practice. He says:—"I have allowed 2s. 6d. per skin for the perusal of these deeds, as the proper fee a solicitor is entitled to for such duties, as provided for under No. 144 in the Schedule

of Solicitors’ Fees, dated the 3rd of January, 1859, and I have known no departure from the charges so provided.” The Taxing Master, therefore, did not refer to, or intend to invade the general practice as to approval fees. But he considered that it did not apply where the solicitor had been investigating the title, and gets the entire general costs relating to the matter which is the subject of the deed ; for example, where the mortgagor’s solicitor is called on to peruse a draft furnished by the solicitor for the mortgagee. He considered that such a case came under No. 144 of the Schedule of Costs of 1859, and I think he was right.

As to the costs of taxation, the case of *Downing v. Hodder* (1), cited by Mr. Brady, disposed of that question.

I must, therefore, refuse the motion with costs.

Solicitors for the applicant : *Messrs. Reade & Goodman.*

Solicitor for the minors : *Mr. A. Nesbitt.*

Rolls.
1870.

THE “RIVOLI” AND CARGO.

(By permission, from 4 Ir. L. T. 454.)

Taxation—Costs.

Admiralty.
1870.

April 29.
May 4.

THIS was a motion on behalf of the defendants in this cause for an order that the defendants’ bill of costs, taxed and certified on the 23rd of April, might be referred back to the Registrar for the purpose of having the taxation reviewed in respect of certain items of charge which had been disallowed by the Registrar, and that the Registrar might be allowed to vary his certificate of taxation by adding to the defendants’ costs and to his certificate the amount of said several items. The facts of the case will be found stated in the judgment.

Elrington, LL.D., and Boyd, LL.D., Q.C., for the plaintiffs.

Seeds, LL.D., for the defendants.

Admiralty.
1870.

They cited the *Bahia* (1), the *Biddick* (2), the *Karla* (3), the *Olive* (4), "Gray on Costs," p. 499, C. L. P. Act, 1853, sec. 118.

TOWNSEND, J.:—

May 4.

This case comes before me on a motion to refer the defendants' bill of costs back to the Registrar, to review his taxation in respect of certain items of charge which he has disallowed, and to vary his certificate of taxation accordingly.

Some questions have been raised in the argument which, are not only important as regards the respective parties in the cause, but as affecting to some extent the future practice of the Court. The motion has been very properly brought forward rather to settle the disputed points than as a mere contention respecting the amount of the several items in dispute, the principal of which relate to the expenses and costs of some of the defendants' witnesses, who were not examined, but whose evidence was, as the defendants allege, so material and necessary that they were justified in detaining them, not only to give their evidence—which according to the practice of this Court may be done in some cases by affidavit—but for the purpose of examining them *viva voce* in Court, and if necessary, confronting them with the plaintiffs' witnesses at the hearing. The plaintiffs, on the contrary, deny the materiality of those witnesses, and the necessity for producing them, and assert that they might properly have given evidence by affidavit, or been examined *de bene esse*, and that their detention was quite unnecessary even if their evidence were required. In order to determine this alleged materiality and necessity, it is necessary to consider what the pleadings were, and what were the questions raised upon them between the parties in the cause.

This was a salvage suit, promoted by the respective owners of three steam-tugs—the "*Marseilles*," the "*Integrity*," and the "*Norfolk Hero*"—against the barque "*Rivoli*," her cargo and freight. The "*Norfolk Hero*" was owned by the firm of Messrs. Palgrave & Co., who, with the owners of the other tugs, are plaintiffs in the cause. The "*Rivoli*" is owned by the defendants'

(1) Law Rep. 1 Adm. 15.

(2) 38 L. J., Adm. 24.

(3) 13 W. R., 295.

(4) 6 W. R., 274.

firm, Messrs. W. H. Ross & Co. The services of the tugs were rendered on the morning of the 30th December last, in Kingstown Harbour, and consisted of towing the "Rivoli" from a place near the Western Pier, where she had drifted to the shore and struck upon the rocks, into safe moorings. Before the petition was filed the defendants tendered, in the manner usual in this Court, a sum of £200 to all the plaintiffs conjointly in satisfaction of their demand. The tender was refused, and on the 21st of January last the plaintiffs filed their petition. On the 2nd February the defendants filed their answer, in which they alleged that Messrs. Palgrave & Co. were the ship's agents, that on the 29th December (the day before the salvage) Captain Le Pelletier, the master of the "Rivoli," had gone on shore for the purpose of communicating with them; that on the following day the first mate, finding the vessel to be dragging her port anchor, ordered the starboard anchor to be let go; but that before she brought up the vessel touched the rocks, and swung off to the West Pier; that immediately thereupon the first mate sent the second mate ashore to find the person who acted at Kingstown for Palgrave & Co., in order that they might take necessary measures to have the ship got off; but a number of the Coastguard men, Harbour Commissioners' men, and others came on board for the purpose of raising the anchors. That while they were doing so the second mate returned, stating that he had found Messrs. Palgrave's representative, who would arrange that the vessel should be got off. That soon afterwards one of the tugs, the "Marseilles," arrived with Messrs. Palgrave's agent on board her; and that the first mate, believing him to have come in consequence of the message sent him, did not make any agreement with the "Marseilles." The "Marseilles" got a hawser passed, but it was carried away; the "Integrity" then came up, and finally the "Norfolk Hero," and the barque was towed into a safe berth in the harbour.

On the 7th February the plaintiffs filed a reply, denying that Messrs. Palgrave were agents for the vessel on the 29th December, or until the next day, alleging that the first persons on board the vessel were the harbour master's men, and asserting that the tugs, and particularly the "Norfolk Hero," had incurred considerable danger. The reply then formally denied the allegations of the

Admiralty.
1870.

answer, save as appeared by the petition. The defendant concluded the pleadings, denying the statements of the reply.

I must here observe that this matter of the agency of Messrs. Palgrave has been regarded by both sides as of more importance than I attribute to it. Even though Messrs. Palgrave had been agents for the ship at the time of the salvage, as they seem to have been, it could hardly be contended that it was part of their ordinary duty, as such agents, to supply their own tug to get their employers' vessel out of a critical position, and their claim as salvors could hardly have been successfully resisted on the mere ground of their agency. But this question of agency, as a bar to salvage, has not been raised in the case. The defendants, by their tender, have admitted that, to the extent of £200, the plaintiffs collectively, whether agents or not, had rendered a salvage service. The agency of Messrs. Palgrave was a merely subsidiary and collateral matter. The first mate, as is alleged, did not attempt to make an agreement with the "Marseilles," because a person he deemed to represent the ship's agents, was on board her; from which, I presume, it was intended the Court should infer that he otherwise might and would have made such an agreement, although there is no express allegation to that effect. I am quite unable to discern the relation of all this to the main question, since assuming that such agreement might and would have been made, the tender admits, substantially, that whatever might have been done in the circumstances, and whatever mistake had occurred, there had been a salvage service effected worth £200. And so the only question was, was that a sufficient remuneration for the plaintiffs? Yet the plaintiffs thought this useless assertion of the Messrs. Palgrave's agency worth a reply; and the defendants have, as has been pressed upon me, incurred much expense in preparing evidence on that very subject, and I cannot but think that the reply has unfortunately led to much of the expense respecting which these questions have arisen.

Some delay took place in bringing the case to a hearing. The defendants' solicitor, Mr. Neilson, states that it was ready for trial on the 12th February last, and from thence to 9th March he frequently applied to the plaintiffs' proctor, Mr. Hamerton, to fix the time of trial. Mr. Hamerton states that he was willing

to have the evidence of the defendants' witnesses taken *de bene esse*, or by affidavit, and he made that proposition to Mr. Neilson on 10th March, but it was declined. The learned Vice-Chancellor of Ireland, who, during my illness, did me the honour and favour of acting for me here, was occupied for some time in his own Court. When he became disengaged, counsel were absent on circuit, and so the application to fix the mode and time of trial was not made until 25th March inst. He then directed that the evidence should be taken *vivâ voce*, and gave the parties leave to fix in the Registry a day for the hearing. He thought the case one in which the defendants' evidence might properly have been given on affidavit; but the defendants not agreeing in that view of it, the Master and first and second mates were detained for oral examination at the hearing, which took place before the Vice-Chancellor on the 31st March and the following day. I do not think, in the circumstances of the case, either party can be deemed guilty of any wilful delay. The defendants examined six witnesses only—namely, the two mates, the chief boatman of coastguards at Kingstown, the coxswain of the Harbour Master's boat, the Harbour Master himself, and Mr. Cowper, clerk to Messrs. Ross & Co., who proved certain letters, which I shall presently mention. The defendants had in their answer alleged the value of the ship, cargo, and freight to be £7,400. The plaintiffs, on the day before the hearing, accepted that valuation, which was accordingly admitted by consent at the hearing. The learned Vice-Chancellor pronounced for the tender, and gave the defendants their costs thereout. No appeal has been interposed from that decision.

The defendants' solicitor accordingly proceeded to tax his costs, claiming in respect thereof the sum of £203 0s. 10d., which the Registrar has taxed to £95 11s. 8d., and he has given a certificate for the latter sum. I am now asked to direct him to review that taxation in respect of certain items specified in a schedule to the notice of this motion, which items I must now proceed to consider somewhat in detail.

Passing over, for the present, the first of them (No. 31), the items from 36 to 40, both inclusive, relate to a consent dated 26th March last, to admit without further proof, amongst others, three letters from Messrs. Palgrave & Co. to Messrs. Ross & Co.,

Admiralty.
1870.

dated respectively the 15th December, 18th December, and 30th December last. Those letters were proved at the hearing by Mr. Cowper. The consent was tendered by Mr. Neilson to Mr. Hamerton, who refused to sign it. Mr. Neilson consequently produced Mr. Cowper, and his expenses have been taxed and allowed; nor is there any further dispute respecting them. But it is contended that the Registrar should have also allowed the costs of the consent, because it was a proper step in this Court as at Common Law. The 67th section of the Court of Admiralty (Ireland) Act, 1867, provides—[His Lordship read the section]. This is analogous to the 118th section of the Common Law Procedure Act, 1853, which, however, contains the additional words—[His Lordship read them].

Although these Acts speak of a notice, not of a consent, and the 58th General Order of 1853 gives the form of notice to be used at Common Law in such cases, yet as the tendering of the consent is to the same effect as giving the notice, and as no form of consent or notice is prescribed by the Court of Admiralty Act of 1867, or by the rules of this Court, I think the tender of the consent was equivalent to giving a notice, and that it must have the same effect—namely, to throw upon the plaintiffs the liability to pay the costs of the witness, rendered necessary by their rejection of it. It was a judicious act on the part of Mr. Neilson to tender such consent, for he thereby not only did what was proper to avoid useless expense, but would have protected his clients against liability for the costs of the witness to prove the letters, in case the Court had overruled the tender, and given the general costs against the defendants. But as the consent was inoperative, and the plaintiffs have to pay the costs of the witness, I do not think the defendants can, as between party and party, have the two sets of costs—namely, of the consent and of the witness; and I am of opinion that the Registrar has done rightly in disallowing the costs of that consent. Those five items are thus disposed of.

I now return to item 31—"for attending at Kingstown, and taking the evidence of witnesses." This is one of a class of charges relating to the costs of summoning certain witnesses, preparing their evidence for counsel, and bringing them up to the hearing

which the Registrar has disallowed, thus—namely, he has disallowed altogether No 54, and from thence to 64 inclusive, also Nos. 71, 73, 74, 75, 138, and from thence to 147 inclusive; and he has disallowed, in part, Nos. 31, 76; 77, 81, 148, and 150.

Mr. Neilson has stated in his affidavit that the witnesses included in his costs were examined by him or by his assistant, in pursuance of his counsel's direction of proofs; that he found they were all present at the time of the salvage (from that statement, however, Captain Le Pelletier must be excepted); that he apprehended that if he omitted to have any of them ready, or to have their evidence briefed, it might be prejudicial to his clients' interests; that he feared, from some of them being seamen, they might not attend, though subpoenaed; and that he believed they were all material and necessary; that they were not summoned to make costs, but *bonâ fide*; that they all attended the trial, to be produced if called on. Of the truth of those statements I entertain no manner of doubt. But the only witnesses, in fact, produced by the defendants were those I have already mentioned, and the only documents read in evidence by them were those letters of 15th December, 18th December, and 30th December already mentioned, and a copy of a letter from defendants to plaintiffs of 20th December last.

I may briefly dispose of one of the questions argued in this case by stating that in my opinion Mr. Neilson was not bound to examine his witnesses by affidavit. No order to that effect was made. The rules of this Court enable either party who may deem it advisable to apply that the evidence shall be taken in that manner; but although in the salvage case, where a tender is made, such a mode of examining may be of advantage, as it probably would have been in this case, yet, I think, the defendants were not bound to make such an application, nor to accede to Mr. Hamerton's offer, although I think, as did the Vice-Chancellor, the offer was fair and reasonable in the circumstances of the case. The opinion expressed by Doctor Lushington in the *Karla* (1) has been cited by the defendants' counsel. But that was a cause of damage. There is an express rule of the English Court—No. 66 of the Rules of 1862—that in salvage causes proof by affidavit

Admiralty.
1870.

shall be the ordinary mode of proof, unless notice shall be served by either party objecting to that mode of proof. Indeed the Registrar has informed me that he has disallowed the costs of such witnesses only as he deemed immaterial or unnecessary, or both. In this particular case it happened that the witnesses whose costs were wholly disallowed had not been examined. No doubt it may be the duty of the party who summons a witness to be provided with his testimony, and if the facts he is intended to prove appear to be material to the right decision of the case, the costs of such witness may be allowed, even though he be not produced, in consequence of that fact being otherwise established: *The Biddick* (1); Gray on Costs 497; 1 Chitty's Archb. Prac. 514. It is the proper function of the Registrar, who is the taxing officer of this Court, when allowing the costs of evidence to consider the question at issue, and to exercise his discretion whether the witness is expected to speak to it or not. It does not appear that the Registrar disallowed the costs of any witness merely because he might have been examined *de bene esse* or because his evidence might have been taken by affidavit. At Common Law it is an established principle that the materiality of the witnesses is a question for the taxing officer: *Dods v. Evans* (2); *Jones v. Tobin* (3); *Speeding v. Young* (4). I think Mr. Neilson might have acted in perfect consistency with the advice of his counsel if he had accepted either alternative of Mr. Hamerton's offer. I do not say he was bound to do so; but where I am to exercise my discretion as a judge in the matter I cannot but regard what might have been done in the peculiarities of the case. No doubt the Registrar's discretion is exercised subject to the review of the Court. I do not assent to the argument that I am to be considered merely as a Court of Appeal from the Registrar. I think this Court exercises an original jurisdiction, and has a discretion in the matter, as have the Courts of Law in similar motions: *Galloway v. Reyworth* (5). But where the question is one for the discretion of the officer, and no legal principle is involved, the Court will not interfere, unless, as was said by

(1) 38 L. J. Adm. 24.

(2) 15 C. B. N. S. 621.

(3) 4 Bing. N. C. 123.

(4) 33 L. J. 286.

(5) 15 C. B. 231, per MAULE, J.

Baron Greene, in *Thomas v. Mennix* (1), there were gross misprision on his part. In that case fifteen witnesses had been brought to the trial, and the Taxing Master had allowed the expenses of seven only. But the Court refused to interfere. So in *Clarke v. Tyne Improvement Commissioners* (2).

And in like manner it is the proper function of the Taxing Officer to exercise his discretion as to the number of witnesses to be allowed. This is the rule of Courts of Law: *Pilgrim v. The Southampton and Dorchester Railway Company* (3).

The Registrar has exercised his discretion accordingly with respect to the four Kingstown men—Henry Williams, Miller, William Williams, and Grantham—and I refuse to interfere with his decision respecting them, as I am unable to see that he has been palpably wrong, or made any mistake of principle. J. Hanratty was not examined; it does not appear what he was summoned to prove, and the officer informs me that no special reason was offered why, not having been examined, his costs should be allowed. I see no reason to doubt that the Registrar took a right view of the matter as regards him, as well as with respect to the four others I have mentioned. He was justified in disallowing the expenses of any witnesses if he thought their testimony was immaterial, and that to have examined them would have been to crowd the case with merely superfluous testimony, which no party in a cause has a right to do, to the prejudice of his adversary. I am aware that Mr. Neilson states that he acted by his counsel's advice of proofs; and I am well disposed to regard the advice of counsel in such matters with due deference. But counsel's advice is not conclusive on the Taxing Officer in taxing costs between party and party, and he must, after due regard had to it, exercise his own discretion respecting the manner in which it has been carried out, otherwise great injustice might be done, and the party liable to pay costs be mulcted in the expensive measures taken for mere precaution, or in the literal fulfilment of directions often necessarily general and vague in their terms. The charge No. 31, for taking evidence at Kingstown, was, I think, rightly reduced to the proper amount for taking the evidence of the witnesses who were actually produced.

(1) 4 Ir. C. L. R. 128.

(2) L. R. 3 C. P. 230.

(3) 8 C. B. 25.

Admiralty.
1870.

I also think that the discretion of the Registrar in disallowing the costs of briefs of evidence not used, and not material or necessary, should not be interfered with. This is a matter purely for him to investigate; and, unless in very peculiar circumstances, I would not investigate it anew. However, in this instance, I concur in the view he has taken. Thus I dispose of all the items in the schedule down to 138, except No. 71—"Attendance on Captain Le Pelletier, taking his evidence." That item depends on whether the Registrar should have allowed the costs of the Master in this case; and as that is an important question it deserves a separate consideration.

An affidavit has been made by Mr. Cassel, of Liverpool, one of the firm of Ross & Co., which states that the "*Rivoli*" was ready for sea on 17th February; that he had to make arrangements with Captain Le Pelletier, who is a French Canadian, and with the first and second mates, Frew and Saunders, to remain in this country; and that they refused to do so unless paid their wages and board; that they remained for the sole purpose of being examined; that the defendants have paid them the sums specified in a schedule to the affidavit, and that unless such sums were paid the witnesses would have left the country before the hearing. Frew and Saunders were, indeed, examined, and their wages, subsistence, and travelling expenses have been allowed, but to a less amount than was claimed. I presume the Registrar has allowed them according to the rules, and I think he should not have allowed any larger amount. I cannot visit on the plaintiffs the consequences of the arrangement made by the defendants with those witnesses. And if that arrangement now presses hardly on the defendants, it must be remembered that they preferred it to accepting the offer of the plaintiffs' proctor respecting the examination by affidavit of these very persons.

The most important matter is the sum charged in respect of the Master's detention—wages and travelling expenses. The defendants contend that though he was not present at the salvage, nor produced at the hearing, yet they were advised to produce him; that his detention was absolutely necessary to ensure his attendance, and that they were unable to detain him but on the terms of paying his wages, subsistence, and passage-money to

Quebec. These sums amount to £65 8s. 6d., of which £20 14s. is stated to be his passage-money home. And they rely on the case of "*The Bahia*" (1) as an authority to that effect.

Admiralty.
1870.

That was a suit for damages sustained by the plaintiffs in consequence of the master of a French brig not having delivered a cargo in accordance with the terms of a bill of lading. The Judge pronounced against the plaintiffs, and condemned them in costs. The defendants in their costs claimed £467 10s. for expenses and detention of the Master for twenty-one months and a quarter from the institution of a suit to a week after the delivery of the judgment. The Master had never been called as a witness; but the Registrar, finding he had attended in Court to give evidence if necessary, allowed him the expenses of attending for two or three days at the rate usually allowed persons in his position. The Judge of the Court of Admiralty, after stating the practice at Common Law, thought that the Master was a necessary witness, and that it was necessary to detain him to secure his evidence, and allowed £1 a week for sixteen months to a period when the defendant applied to have the cause put off.

The first question, then, being, Was the Master a necessary witness? The Court held that he was so, because of the nature of the suit, and because counsel for the defendant so considered him, which fact was not questioned by the Registrar, and therefore might be assumed by the Court. But the present suit now before me was not one of damage to cargo, but of salvage. Every material fact incident to the salvage service took place when the Master was absent, and all occupied but two and a half hours. It has been argued that the Master was a necessary witness to prove the agency of Messrs. Palgrave, and the value of the property salvaged. I have already stated my opinion that the agency of Messrs. Palgrave was a matter of no importance whatever, and if it were important, it was to be at least as well proved by the letters given in evidence as by the testimony of the Master, if he could give any on the subject. It is urged that he might be required to prove the value. But the value of the vessel, if in dispute, was matter for a shipwright or other skilled witness, rather than for the Master to depose to; the value of the cargo

(1) L. R. 1. Adm. and Ecc. 15.

Admiralty.
1870.

could be proved by the invoices, which must have been in the defendants' power, and the freight was to be ascertained by the charter party or bill of lading or both. It does not appear that the defendants had any difficulty on that point; the plaintiffs took the valuation of the defendants, and if they had not done so the defendants should have had the ship surveyed, and have produced the invoices and other documents. So that I cannot come to the conclusion that the Master was a necessary and material witness in this case; it was not a case of damage to cargo; the Registrar did not adopt the view of counsel. The advice given by counsel, however right and prudent it may have been, if we had only to consider the case as between attorney and client, does not bind the Court in doing justice between party and party. The advice of counsel as to producing the Master might have been, in my opinion, sufficiently complied with by taking his evidence by affidavit, or *de bene esse*. I could not allow his expenses if he merely came to watch the proceedings. As I must decide the matter, I am constrained to say that I do not think the Master was a material or necessary witness in the case; and I regret that so much expense has been incurred in detaining him; but I cannot now inflict that expense on the plaintiffs.

As I think the evidence of the Master unnecessary, I think the disallowance of item No. 71 was right. The only remaining question is that relating to Nos. 138 to 144, both inclusive, which comprise the costs of Mr. Cassel's affidavit. The practice of this Court has hitherto been that in taxing witnesses' expenses an affidavit is not made respecting them unless the party objecting to them requires it. Now the costs were taxed and certified on 23rd April. The affidavit was filed on 20th April, the day on which the costs were lodged. The former practice, where not altered by the rules of 1867, is preserved by the 11th of these rules; and the rules have not altered the practice theretofore existing in that respect. Therefore I think Mr. Cassel's affidavit, however necessary for this motion, was premature at the time it was filed, and that the Registrar has rightly disallowed the costs of it.

I have more than once stated that I have no doubt that Mr. Neilson acted *bonâ fide*; and I am also aware that the plaintiffs, by rejecting the tender, primarily brought on all this litigation.

Yet they have had to bear the consequences, for they will lose, in the shape of the general costs of the cause, at least one-half of the reward they might have had without any litigation at all. They have been brought here to resist a very startling demand, with much of which I think the defendants were not legally warranted to charge them, and they have resisted successfully. The costs of the motion are, no doubt, in my discretion; but I think the rule laid down in *Barker v. Birch* (1) a wise and safe one—namely, that when costs are in the discretion of the Court it will follow the general rule of giving costs to the party succeeding, and that there must be special circumstances to restrain its application. I do not think such special circumstances exist, and I must give the plaintiffs the costs of this motion. I shall refuse with costs so much of the motion as relates to referring back the bill of costs, and varying the certificate. I shall refer the costs of this motion for taxation, and I shall allow the plaintiffs to set off the certified amount of the costs of this motion against the certified amount of the costs of the cause, and pay over the balance to the defendants' solicitor. This was the course followed in *Throckmorton v. Crowley* (2).

Admiralty.
1870.

Plaintiffs' Proctor: *The Queen's Proctor.*

Defendants' Solicitors: *W. Neilson and Son.*

JOHNSON v. EASON.

(*By permission, from 5 Ir. L. T. R. 6.*)

Exchequer.
1870.

May 11.

(Before HUGHES B.)

*Practice—Costs—Substitution of Service—1st General Order of
22nd January, 1856.*

THIS was a motion, on the part of the plaintiff, that Henry Colles, Esq., the Taxing Master, be directed to review his taxation of the plaintiff's bill of costs in this cause, and instead of allowing only £2 10s. sterling, as if the case were governed by the 1st General Order of the 22nd January, 1856, to tax the said costs as though

(1) 1 D. & L. 816.

(2) L. R. 3, Eq. 196.

Exchequer.
1870.

that order were inapplicable; also to allow the plaintiff's costs in the proceedings to substitute service, and also to allow to the plaintiff his costs of taxation.

The action was brought by a Mr. Wm. Johnson against Mr. Dalton Eason, described in the writ of summons and plaint as Secretary of the European Life Assurance Society, to recover the sum of £305 9s., being the amount of the principal and interest alleged to be due on foot of a certain policy of assurance effected with the British Commercial Life Assurance Company, by James J. Farrell, upon his own life. The British Commercial Life Assurance Company had been amalgamated with the European Life Assurance Company. Mr. Farrell died on the 2nd September, 1869. By order, bearing date the 29th January, 1870, it was ordered that service of the writ of summons and plaint upon Mark C. Bentley, the agent at Dublin of the said Society, and transmitting by post a copy of the said writ, together with a copy of the said order, in a registered letter to the defendant, addressed to the head office in the said Society at London, be deemed good service of the said writ upon the defendant, unless cause shown to the contrary in six days after the service of the said order on the said Mark C. Bentley, and after such transmission by post as aforesaid. On the 31st January, 1870, the aforesaid service was effected upon said Mark C. Bentley. On the same day copies of the writ and order were transmitted in a registered letter, as directed by the order. No cause was shown against the order, and the plaintiff was entitled on the 7th February to have it made absolute. The order was not, however, made absolute; for upon the 8th of February Mr. Craig (of the firm of Hamilton & Craig) called on the plaintiff's attorney on behalf of the European Life Assurance Company to settle the plaintiff's demand, but submitted that the plaintiff was not entitled to any interest, and to no more than the sum of £2 10s. for costs. Mr. O'Meagher, the plaintiff's attorney, then consulted his counsel, and communicated to the defendant's attorney, by letter, the result of counsel's opinion, which was to the effect that the plaintiff was entitled to the interest and to his full costs. On the 10th February an interview took place between the plaintiff's and the defendant's attorneys, on which occasion the defendant's attorney undertook to pay the

amount of interest charged on foot of the policy, together with the costs, when taxed by the proper officer. *Eschequer.*
1870.

There was a conflict upon the affidavits used upon this motion as to whether or not the defendant's attorney had, upon the occasion of the said interview, conceded the plaintiff's right to full costs.

Upon the 12th February the defendant's attorney paid, by cheque, the amount of the principal and interest sued for, and signed the following undertaking with respect to the costs :—

“ We hereby undertake, on the part of the defendant, to pay the plaintiff's costs between party and party when taxed and ascertained.

“ Dated this 12th day of February, 1870.

“ HAMILTON & CRAIG,

“ Defendant's attorney.”

The costs having come before the Taxing Master for his taxation; the defendant's attorney submitted that the plaintiff was not entitled to more than £2 10s. for costs. The Taxing Master ruled in favour of that view, and disallowed the plaintiff all further costs—not excepting the costs of the taxation. Upon this state of facts the present motion was instituted.

J. A. Byrne, for the plaintiff, in support of the motion :—

The 34th section of the Common Law Procedure Act, 1853, expressly directs “that the Taxing Officer *shall* allow reasonable costs on such proceedings for substituting service or effecting such service as the Court shall have directed or deemed good.” The statute is in this respect mandatory, and if the first General Order of the 22nd January, 1856, be held to apply to a case of this kind, it is *pro tanto*, *ultra vires*.

J. A. Philips, for the defendant, *contra* :—

The Order of the 22nd January, 1856, is clear in its terms, and has been acted upon up to the present time, as well in cases of substitution of service as other cases.

Exchequer.
1870.

The Court made the following Order:—

The Court doth hereby declare that the plaintiff is entitled to the costs of the proceedings to substitute service in this cause, and therefore order that the said bill of costs be referred back to the said Taxing Officer for re-taxation, and that he do also tax the costs of said taxation, and no costs of this motion.

Attorney for the plaintiff: *J. Casimir O'Meagher.*

Attorney for the defendant: *Hamilton & Craig.*

Exchequer.
1870.

LECLERC v. GREENE.

June 9, 10, 11.

(*By permission*, from I. R. 4 C. L. 388 ; s. c. 4 Ir. L. T. 780.)

Practice—Costs—Libel—Limited discretion allowed to Taxing Officer—Brief of Report of another Trial—Fees to Counsel—Second Case for Proofs.

A plaintiff who is entitled to the general costs of the cause is entitled to all the costs of, and incidental to, issues on which he succeeded in part ; and the defendant is not entitled to the costs of, or incident to, issues upon which he succeeded only in part.

Circumstances under which this principle has the effect of limiting the discretion of the Taxing Officer illustrated.

Costs of brief of a shorthand report of a former trial, in which the same parties were engaged, allowed under special circumstances.

The principle of the case of *Morgan v. Gray* (10 Ir. Jur. N. S. 335), approved and followed.

THIS case came before the Court upon motion on the part of the plaintiff, purporting to be by way of renewal of a motion, of which notice was served upon the 30th April, 1868. An order had been made upon the former motion upon the 18th January, 1870, to the effect that Henry Colles, Esq., the Taxing Master, do review his taxation of the plaintiff's and of the defendant's costs of this action, certified by him upon the 21st and 22nd of November, 1868, in respect of the several items set forth in the notice of motion, the Court stating it, on the face of the order, to be their opinion that the principles laid down in the case of *Morgan v. Gray* (1) should be applied to the taxation of the costs in this

(1) 10 Ir. Jur. N. S. 335.

cause; and directing that the said bill of costs be referred back to the Taxing Master generally for his re-consideration, having regard to the said case of *Morgan v. Gray*, with liberty to him to report generally to the Court, if he should think fit, and with liberty to the parties respectively, or either of them, to apply to the Court with reference to the costs of this motion, or otherwise, as they might be advised.

Exchequer.
1870.

This was an action of libel, brought by a nephew against his uncle for an alleged libel contained in a letter from the defendant to a Miss Susan Philips. The letter ran as follows:—

“11th January, 1866.

“MY DEAR SUSAN,—I am not in the least offended, especially as I know you wrote in ignorance of the facts; and I remind you that in your case I am merely acting for others; that I have nothing but trouble and annoyance and ingratitude from some (not from you) in return for my efforts to carry out the wishes and will of your deceased sister. You are entitled to £25 a year—to be paid quarterly, not in advance, and subject to the current rate of income tax—out of the property left Lydia's sons. To accommodate you, I have generally paid you in advance, and have not deducted income tax. Now, I have done this at my own risk, as, should anything happen you, I can only charge your annuity to the day of your decease.

“Now, I am not going again to place myself, or my family, in the power of anyone; sad experience deters me from doing so. As to your being ‘paid by others,’ there is no one to pay you but myself, and I am only obliged to pay you in the way I have stated; but I do not say that I will not oblige you as far as I can. I will have nothing to do with my ungrateful and ruffianly nephews. As to their dead mother, I suppose it is better to let her rest, if she can do so, having left this world with perjury on her lips and, I fear, ingratitude in her heart. I, who never injured her or hers, in thought, word, or deed, did not deserve such treatment. I verily believe she hoarded the money I gave her to pay for the education of her children to enable her to use the law for the purpose of robbing me, if she or her sons could. I should not wonder if she got a shove to hasten her end, in order that the

Eschequer.
1870.

money payable at her death might be available for law costs. At all events, she was not cold in her grave before I got an attorney's letter demanding payment—which I was fortunately able to make by next post—of £1,000. These youths owe your nephews £550; Dr. Stewart, of Belfast, £500, or upwards; and a poor family near this, £90, which their father and mother shirked the payment of; besides a large sum they owed my father. There was an insurance on Mrs. Leclerc's life, which was to be available to pay some small amount of these debts, and it seems they will now avoid paying if they can. All this is foreign to your two pounds, which is of most consequence to you, and which I enclose, and remain, dear Susan,

“Your affectionate Cousin,

“JOHN GREENE.”

The writ of summons and plaint contained two counts. The first count set forth the material portions of the libel, with innuendos, charging the plaintiff and his brothers with being ungrateful and ruffianly; secondly, with intent and efforts by him and his brothers to defraud and cheat the defendant and others; thirdly, with murderous attempts by plaintiff and his brothers to hasten the death of their mother; fourthly, with dishonest attempts on the part of the plaintiff and his brothers to avoid paying their just debts. The second count set out the entire of the libellous letter, without innuendo, save as to the persons alluded to in the libel. The defendant pleaded—first, that he did not write or publish the alleged libel in the first paragraph mentioned; second, that he did not write and publish the libel in the defamatory sense imputed; third, as to the second count, that he did not write and publish; fourth, that he did not write and publish the alleged libel in a defamatory sense; fifth, a plea of justification as to that portion of the alleged libel containing the words “ungrateful and ruffianly nephews;” the sixth and last defence was one of privileged publication. The fifth defence set forth acts of kindness on his (the defendant's) part to the plaintiff and his brothers, and justifies, on the ground of gross misconduct on the part of the plaintiff and his brothers, which it particularised—viz., wrongfully taking possession of a house and farm of the

defendant's and destroying them, and acting with violence, &c. This plea was, by leave of the Court, amended by adding further acts of alleged misconduct—further injuries to the said house by writing upon the walls, &c. The fifth and sixth defences, with respect to which the Taxing Officer arrived at certain conclusions as to the view taken by the jury, which were impugned by the plaintiff as not justified by the materials before him, ran as follows:—Fifth. And for a further defence to so much of the first paragraph as complains that the defendant wrote and published of and concerning the plaintiff the words following—that is to say, “I will have nothing to do with my ungrateful and ruffianly nephews;” and as to so much of the said second paragraph as complains that the defendant wrote and published of the plaintiff the words following:—“I have nothing but trouble and annoyance and ingratitude from some (not from you), in return for my efforts to carry out the wishes and will of my deceased sister. I will have nothing to do with my ungrateful and ruffianly nephews.” The defendant says that for a long series of years the defendant had acted with great kindness and consideration towards the plaintiff and his brothers, Peter Henry Leclerc and Robert Leclerc, who were nephews of the said defendant; that the defendant had, amongst other acts of kindness, from time to time advanced and supplied money to the mother of the said plaintiff and his brothers, in order to assist in having the said plaintiff and his said brothers well and respectably educated according to their position in life; that the said defendant had, from time to time and frequently, invited the plaintiff to spend his vacation, when he was at school, at the house of the defendant, where he had accordingly, during such vacations and at other times, been often hospitably entertained by the defendant; that the said defendant had also entered into security with the firm of Guinness & Co. for the plaintiff, in order to enable him to obtain employment as a clerk in the office of said firm; and that, down to the 14th day of April, 1865, feelings of friendship and kindness, as between an uncle and a nephew, had to all appearance subsisted between the plaintiff and the defendant, and had so subsisted on the defendant's part in reality and truth; and benefits, during all the time aforesaid, were conferred by the defendant upon the plaintiff; and

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Exchequer.
1870.

down to and immediately before the commission by the plaintiff of the acts hereinafter mentioned, the plaintiff had continued to associate with the defendant upon terms of friendship and intimacy; and no intimation or notice had been given by the plaintiff to the defendant of any intention on the part of the plaintiff to act in any manner which might be offensive, hostile, or injurious to the said defendant, and more particularly in the manner hereinafter mentioned; and the defendant further avers that, notwithstanding the premises and the benefits and kindness conferred and shown by the defendant upon and to the plaintiff, the said plaintiff behaved in an ungrateful and ruffianly manner in this, to wit, that the said plaintiff, acting in concert, collusion, and combination with his said brothers, Peter Benjamin Leclerc and Robert Leclerc, conspired to do and execute the acts, matters, and things following—that is to say, that, upon the 14th day of April, 1865, the plaintiff and his said brother, Peter B. Leclerc, took unlawful, wrongful, and forcible possession of a certain house and farm of land, to wit, the house and farm of Birchfield, situate in the County of Kildare, of which said house and farm the said defendant had theretofore been and then was, by himself and his servants, in peaceable and lawful possession and occupation; and the said plaintiff, with force and arms, expelled from the said house and lands the servants and caretakers of the defendant then and there being, and held and detained the said wrongful possession of the said house and lands, and by and through themselves and persons employed by them, continued with force and arms, and against the peace of our Lady the Queen, and for a period of nine weeks, to hold such forcible possession and detainer, and did; while so wrongfully in possession of the said house and lands, seriously damage the said house, and, amongst other things, made use of one of the rooms thereof as a common privy, and by reason thereof accumulated filth and excrement therein, and did divers other injuries to the said house and the fixtures thereof by discharging firearms loaded with balls and other matters into and against the wall and woodwork thereof; and also cut down divers trees upon the said lands, and made use of some of the trees so cut down for the purpose of barricading the said house and excluding the said defendant, his family, and servants therefrom; and the

defendant further avers that the plaintiff, while so wrongfully in possession, and in pursuance of and according to the said combination, by persons employed by the said plaintiff and his brothers, from time to time during the night, and at other times, discharged loaded arms, to wit, guns and pistols, upon the said lands and about the said house, to the terror of all well-disposed subjects of our Sovereign Lady the Queen, and for the purpose of affrighting the said defendant and deterring him from re-taking possession of the said house and lands, and in order to induce the defendant to believe that any attempt to re-take the said possession would be resisted with force and arms; and the defendant further saith that before the plaintiff and his brothers had so taken such wrongful and forcible possession of the said house and lands, he, the said defendant, had fitted up and prepared the said house as a residence for the said defendant's only son, one Thomas Greene, who was, upon Saturday, the 15th April, 1865, about to be married; and that it was intended and had been arranged by and between the defendant and his said son that, upon such marriage taking place, the said Thomas Greene should bring his wife to the said house, and that the said Thomas Greene and his wife should take up their residence in said house, of all which said premises the plaintiff was well aware at the time of the commission of the said several acts; and the defendant further avers that the said intended marriage of his son, Thomas Greene, was solemnised upon Saturday, the 15th of April, 1865, and that the said plaintiff and his said brother, so conspiring as aforesaid, and well knowing that the said marriage was about to take place, and in order, among other things, to prevent the said defendant's said son and his wife from taking up their residence in the said house, did, upon Friday night, the 14th of April, 1865, without notice to the said defendant or his said son, and while the said defendant was away from home and from the neighbourhood of the said house and lands, and while he was totally unprepared for such a proceeding by the said plaintiff, with force and arms, take the forcible and wrongful possession of the said house and lands, which had been so fitted up and prepared in manner hereinbefore more particularly mentioned, and wrongfully detained the same, and prevented the defendant's said son from taking up his residence therein; and the said defendant saith that,

Exchequer.
1870.

in all the acts, matters, and things aforesaid, the said plaintiff behaved in an ungrateful and ruffianly manner, and was, in character and disposition, ungrateful and ruffianly; and the defendant saith that the said several acts, matters, and things in this defence set forth respectively happened and occurred before the writing and publication by the said defendant of the alleged libel, in the introductory part of this defence set forth; and defendant avers that the several matters and statements in the said libel, as mentioned and referred to in the introductory part of the defence, are true in substance and in fact, wherefore the defendant wrote and published the said words in the introductory part of this defence mentioned.

The sixth defence ran as follows:—

And for a further defence to the said first paragraph the defendant says that, long prior to the writing and publication of the alleged libel in the second paragraph complained of, and which alleged libel was contained in a letter written and sent by the defendant to one Susan Philips, the defendant was trustee and executor of the will of Mrs. Lydia Greene, deceased, under which will the defendant, as such trustee and executor, was bound to pay the said Susan Philips an annuity or yearly sum of £25, which said annuity was payable by quarterly payments, at the expiration of every three months; and the defendant saith that, for many years prior to the writing and publication of the said alleged libel the defendant had paid to the said Susan Philips, in order to oblige and accommodate her, the said annuity by monthly payments, and sometimes in advance, although the same was only payable quarterly, and not in advance; and the defendant saith that, before and at the time of the said publication the said Susan Philips had become and was urgent in her request to the said defendant that he should continue to make such payments monthly, and in advance, and was desirous, and had expressed her intention, in the event of the said defendant declining to comply with her said request, to seek to enforce payment of the said annuity through the medium of one of the defendant's nephews—that is to say, the said plaintiff, Peter Benjamin Leclerc and Robert Leclerc, who, she alleged, had power, as trustee of said annuity, successfully to institute proceedings against the said defendant,

and to enforce such payment in manner aforesaid; and the said defendant further avers that, prior to the publication of the said alleged libel and the receipt of said application and intimation from the said Susan Philips, the *said plaintiff and his said two brothers had done and committed the several acts, matters, and things in the last preceding defence more at length set forth, and the several allegations in relation to which, in the said defence, the said defendant prays may be taken as if here at length repeated, and as incorporated with the present defence*; and the said defendant further saith that the said plaintiff had also, with his said brothers, involved the said defendant in an expensive and harassing litigation, which the defendant *bonâ fide* believed to be unfair and unjust towards defendant; and the defendant at the time of the writing and publication of the said letter verily believed that the said Susan Philips *was not aware of the several acts, matters, and things theretofore done and committed by the plaintiff and his said brothers*; and the defendant further avers that the plaintiff was a near relative—to wit, a cousin of the said Susan Philips, and was also a nephew of the said defendant, and that the said Susan Philips was also a relative or connection of the defendant; and the defendant avers that the said Susan Philips, as being such mutual relation, and the defendant, as being also such mutual relation, had each an interest in the character and conduct of the said plaintiff and his said brothers; and that the said Susan Philips and the defendant each had an interest in the solvency and punctuality in payment of any person who might be selected or appealed to by the said Susan Philips to recover or adjust any money demanded on her behalf, and that the defendant had a corresponding interest in the selection and appeal to be so made by the said Susan Philips of or to anyone who should seek to enforce payment of any money demanded from the defendant; and the defendant avers that, in the perfect confidence of friendship and relationship, and with a view of informing the said Susan Philips of the conduct of the plaintiff and his said brothers, and of convincing her of the impropriety of seeking to bring the plaintiff or his brothers into any position of further unpleasantness with the defendant, and of the inexpediency of so doing for the sake of the interests of herself, the said Susan Philips, the defendant wrote and published the

Exchequer.
1870.

said letter in the said second paragraph set forth to the said Susan Philips, and to her alone; and the defendant saith that he wrote and published the said letter in manner aforesaid without malice, and believing that the several statements in the said letter contained were true in substance and in fact.

By order, bearing date the 26th of June, 1866, the defendant obtained leave to add to his fifth defence the following:—

“The said John Greene, the defendant, by way of amendment to his fifth defence, filed on the 19th day of May, 1866, by leave of the Court, says, that while the said plaintiff and his brothers, by themselves and their servants, continued in such forcible occupation and possession of the said house and premises they, by themselves and their servants, wrote, or caused to be written, upon the walls of the said house certain defamatory and scandalous sentences or writings, and amongst them the following—that is to say—‘No surrender;’ ‘None can enter here;’ ‘Take care of yourself, old Jack;’ ‘Mick won’t save you now;’ ‘We will not be accountable for bloodshed;’ ‘How will the swindler answer for what he has done?’ ‘Keep your mouth shut, your eyes and ears open, and your powder dry;’ ‘We will part with our lives before possession;’ ‘Death before dishonour;’ ‘Beware of bribery;’ and the defendant saith that, upon the resumption of the possession by him, the defendant, of said house, he found said defamatory and scandalous matter upon the walls thereof in manner hereinbefore set forth.”

Issues being knit upon all the defences, the jury found as follows:—

1. That the defendant did write and publish the libel in the first count set forth.

2. As to the second issue, that the defendant did write and publish the said libel in the defamatory sense in the first count imputed to the extent hereinafter mentioned, and no further—that is to say, to the extent that the plaintiff and his brothers were defamed by the defendant having, in the letter in the said paragraph referred to, stated that the said plaintiff and his said brothers would avoid paying certain moneys in said letter referred to, if they could.

3. As to the third issue, that the defendant did write and publish the libel in the second count set forth. *Exchequer,*
1870.

4. As to the fourth issue, that the defendant did write and publish the said libel in the second count set forth, in a defamatory sense.

5. As to the fifth issue, that the fifth defence, as amended on the 7th day of July, 1866, is true in substance and in fact, as alleged.

6. And, as to the sixth issue, that the sixth defence is not true in substance and in fact, as alleged.

The jury accordingly found for the plaintiff, with sixpence damages and sixpence costs.

Upon the taxation of the costs of these proceedings the present controversy arose. The Taxing Officer had disallowed certain costs connected with the second case for proofs submitted to counsel on the part of the plaintiff on account of the amendment made by the defendant in his fifth plea, the officer being of opinion that these were costs exclusively connected with the issue knit upon that plea, which was found for the defendant. These items stood in the bill of costs as follows:—

“23. Copy case for counsel to advise proofs,							
afterwards incorporated in briefs, 42							
sheets	-	-	-	£4	4	0	£2 16 0
“Attending Mr. Dowse, Q.C.					0	6	8 0 6 8
“Paid him fee				-	-	-	2 2 0 2 2 0”

The above allowance of £1 8s., parcel of No. 23, was, in fact, made on account of the first case for proofs, not previously charged for.

The Taxing Officer also disallowed attendance of a reporter who had taken a *verbatim* report of a trial in the Court of Common Pleas, of an action for trespass brought by the defendant against the plaintiff and others; also a charge of £10 for a copy of said report; also the costs of the briefing of said report. Counsel, in advising upon the above mentioned second case for proofs, had directed this report, &c., to be procured.

The Taxing Officer had disallowed eight out of the twenty-eight guineas, being the gross amount paid to the plaintiff's counsel upon their briefs for the trial, in sums of twelve, ten, and six

Exchequer.
1870.

guineas respectively. He had also disallowed the costs of the subpœna and service upon a witness named Lafarrelle, who was not examined, but whose attendance had been required, as a member of the family, for the purpose of proving an innuendo, as also the fee to Dr. Morgan, who was examined as a witness to prove the circumstances of the death of the plaintiff's mother, the officer being of opinion that, the jury having negatived the innuendo making this evidence material, the plaintiff was not entitled thereto, notwithstanding the fact that the jury had, upon the same issue, found the libel to have been published in another defamatory sense. Dr. Morgan also gave evidence of the affectionate relations existing between the plaintiff and his mother.

The Taxing Officer allowed the defendant a sum of £45 15s. 3d. as costs exclusively applicable to the issue knit upon the fifth defence, upon which the defendant succeeded.

In advising upon the above mentioned second case for proofs, the plaintiff's counsel wrote:—

“The additional matters contained in the amendments require very considerable additions to be made to the proofs—viz., anything that can be put forward to disprove these new allegations. In fact, these new allegations contain very much the case upon which the defendant relied to aggravate the damages against the now plaintiff and his brothers in *Greene v. Leclerc*, that was tried in the Common Pleas. Have such trustworthy additional witnesses as can be produced who will show what really took place in the house and grounds, and be particular in explaining the instances of wanton insult that were relied on in the action for assault. If possible, show that these matters now introduced are a mere after-thought,” &c., &c.

This case having been sent back to counsel with additional instructions to the effect that a garbled report of the former trial had been inserted in one of the Dublin papers by the now defendant, and that he had had another report adverse to the plaintiff printed for circulation, counsel, who had had a portion of the shorthand writer's report of the trial before him, wrote again, this time specifically directing that the said printer be subpœnaed to produce the report printed by him, and that the shorthand writer be subpœnaed to produce his original report, and that a full and

correct copy of the said notes be made, the reporter being prepared to swear that his report was correct, and that that printed for the now defendant was a one-sided publication.

Exchequer.
1870.

The Taxing Officer allowed to the defendant, as against the plaintiff, a number of items of costs corresponding to those which he had held the plaintiff disentitled to as being exclusively applicable to the issues upon which the defendant had succeeded. The entire number of items particularised in the notice of motion as objected to amounted to 74, but the principles involved in the ruling of the Taxing Officer are sufficiently illustrated by the above mentioned items.

A shorthand note of the evidence taken at the trial was before the Taxing Master at the time that he was reconsidering his report.

The following is an extract from the voluminous special report of the Master, made upon reconsidering his previous taxation:—

“The jury having found for the plaintiff that the defendant wrote and published a libel charging him with a dishonest intention to withhold payment of his just debts, and, further, that no privilege existed warranting the defendant to write the letter to Miss S. Philips, from the relationship between her and the defendant, I have, under the authority of the case referred to by the Court, awarded to the plaintiff the general costs of the cause, *and also the costs of proving the case of libel to the extent to which the jury have found for the plaintiff*; also all the costs of disproving the case attempted to be set up by the defendant under his plea of privilege—viz., the sixth plea. I have awarded to the defendant merely the extra costs incurred by him exclusively in supporting the issue found for him on the fifth plea—viz., that of justification.

“I further beg to report that the items set forth in the notice of appeal—1st. Nos. 23, 24, 25, are the costs of a second case for proofs submitted to counsel on behalf of the plaintiff, on account of the amendment to the defendant's fifth defence adding to the former allegations therein contained statements of further acts of gross injury to the house by writing on the walls, &c. This entire plea was found for the defendant; therefore, no costs exclusively connected with it could be awarded to the plaintiff. 2nd. Nos. 55, 56, are items charged for payment to a shorthand writer for a

Exchequer.
1870.

report of another case tried at a former time in the Common Pleas, in which the same parties were interested. In the first place—and what is conclusive on these items—the case for which the report was procured was not even attempted to be made at the trial; and secondly, it is a settled principle of taxation that the payment to a shorthand writer for any report of a case never forms an item of costs between party and party—any portion of a statement or evidence of a report of another case that the attorney may be advised, and that the Taxing Officer may find to be useful or material to the case in hand, may be abstracted and briefed. This rule extends to a report of a former trial of the same case, &c., &c.

“136, 140, 144, are briefs of report of the trial in the Common Pleas. These briefs are not, in my opinion, taxable against the defendant. The plaintiff failed in the only purpose for which he could have used these briefs. The plaintiff did not venture to present to the jury any case of malice or damage founded on reports of the trial in the Common Pleas.

“80, 84; service and *viaticum* to Robert Lafarelle, witness to prove innuendo; not examined; not necessary; the proof given by other witnesses in the case.

“92, 93; service and *viaticum* to William Short, a shorthand writer, who took the report of the trial in the Common Pleas; subpoenaed to prove his report; this report not given in evidence. The view of the case on the part of the plaintiff for which this class of evidence was provided, was abandoned at the trial, and therefore must be disallowed, and, according to the view taken by the jury, would have failed.”

Serjeant Armstrong and *J. A. Byrne* for the plaintiff, in support of the motion:—

The plaintiff is entitled to all the costs of the second issue, notwithstanding the defendant's partial success thereon; for, an issue cannot be divided for the purposes of taxation: *Foot v. Barker* (1); and the defendant can be entitled to no costs thereof: *Morgan v. Gray* (2.) The defendant is not entitled to the costs of the evidence applicable to the fifth defence upon which he

(1) 7 Ir. Jur. 47.

(2) 10 Ir. Jur. N. S. 335.

succeeded, inasmuch as the sixth defence, which he failed to establish, incorporated the averments of the preceding one, so that no evidence bearing upon the fifth can be said to have been exclusively applicable to that defence: *Morgan v. Gray* (1). It is beyond all question that had the fifth defence been out of the record, and the averments incorporated from it into the sixth defence been actually written into it, the plaintiff would be entitled to incur and recover all the costs he now claims, for they would be clearly applicable to the issue upon the sixth defence, upon which he succeeded. As respects principle, the case is at present in the same position. For the same reason the plaintiff is entitled to his costs of the evidence applicable to both counts. The conclusion arrived at by the Taxing Officer—that the jury believed all the averments of the fifth defence, and found for the plaintiff upon the sixth defence upon the other portions of that plea, regardless of the truth or falsehood of the averments incorporated from the former defence—is based upon mere surmise, without any materials to justify it, and is, in our view, erroneous in fact. The plaintiff is entitled to the costs of the second case for proofs, occasioned by the defendant not having pleaded the defence upon which he subsequently relied, at the proper time: *Coyle v. Sandford* (2).

With respect to the shorthand writer's report and expenses, and the briefing of that report, our contention is that, according to the opinion of the counsel who directed the proofs, they were wanted for the plaintiff's case, the new matters added to the fifth defence having put in issue the very same class of facts which were relied upon on the previous trial to aggravate the damages against the now plaintiff. They were, in point of fact, too, used at the trial for purposes of cross-examination, and might have been used, if necessary, for the purpose of proving malice. Even supposing the plaintiff not entitled to charge as against the defendant the payments to the shorthand writer, the briefing of the report is clearly chargeable.

The eight guineas taxed off the fees to counsel on their briefs for the trial, must be reinstated, if our view of the connection between the fifth and sixth defences be correct.

(1) 10 Ir. Jur. N. S. 335.

(2) Batty, 497.

Exchequer.
1870.

Mr. Lafarelle's expenses should have been allowed; he was one of the family, and one of those whose view of the libel was material.

Dr. Morgan was examined with reference to matters bearing upon the second issue, and the finding thereon was for the plaintiff, though only partially so. The plaintiff is therefore entitled to his costs as a witness. Dr. Morgan deposed to the affectionate relations which had existed between the plaintiff and his mother; their being known to the defendant was important evidence upon the question of malice.

Exham, Q.C. (with him *F. Dames*), for the defendant, *contra* :—

We do not question the plaintiff's right to the general costs of the cause, and, as a consequence, to all the costs which were not exclusively applicable to the issues upon which the defendant succeeded. The jury negatived three out of the four innuendoes traversed by the second plea, and found for the defendant on the fifth plea. What the Taxing Officer has done is this:—he has read through all the shorthand writer's report of the trial, as well as the directions for proofs, briefs, and other documents, and with these materials before him, has arrived at the conclusion that the costs he has allowed to the defendant, and disallowed the plaintiff, are costs exclusively applicable to the findings upon which the defendant succeeded.

The charge for the payment to the shorthand writer for the report of the trial in the Court of Common Pleas is of a character never allowed as against an opposite party.

[*Per Curiam*.—You need not press this portion of the case; we are disposed to be with you.]

The briefing of the report is disallowed on the further ground that the Taxing Officer was satisfied, as a matter of fact, that the report had been required by counsel solely for the purpose of proving actual malice upon the part of the defendant, by a comparison of it with the alleged garbled report, and no such case was made at the trial.

The deduction of eight from the twenty-eight guineas paid to counsel is made in accordance with the rule laid down in *Morgan v.*

Gray (1), with respect to the fees payable to the plaintiff's counsel, where plaintiff has succeeded upon certain issues only. *Exchequer.*
1870.

The disallowance of the costs of the second case for proofs, submitted to counsel on the part of the plaintiff, in consequence of the amendment to the defendant's fifth defence, adding to the former allegations therein contained, statements of further acts of gross injury to the house, is put by the Master upon the ground that the issue upon the fifth plea was the very one found for the plaintiff. Hence, he rightly concludes that these costs were exclusively applicable to the issue upon which the defendant succeeded. The payment to Dr. Morgan was rightly disallowed, he having been examined solely with respect to matters connected with the death of the plaintiff's mother, and the jury having negatived the innuendo upon which such evidence was alone admissible.

The service and *viaticum* to Richard Lafarelle are also rightly disallowed. He was a witness to prove the innuendoes; was not examined; was not necessary; and this proof was given by other witnesses in the case.

Cur. adv. vult.

The Court delivered no formal judgment, but upon this day June 11 made the following special order:—

The Court doth declare that the plaintiff, being entitled to the general costs of the cause, is entitled to all the costs of, and incident to, issues upon which he succeeded in part.

And declare that the defendant, not being entitled to the general costs of the cause, is not entitled to the costs of, or incident to, issues upon which he succeeded only in part.

And accordingly the Court doth declare—

1st.—That the defendant is not entitled to any costs of the defence of the action, except the costs of the draft, engrossment, and briefs of the fifth defence, being in the nature of a plea of justification.

2nd.—That the plaintiff is entitled to the costs of the case for proofs, fee to counsel, and attendance, being Nos. 23, 24, and 25 in the plaintiff's bill of costs.

3rd. That the plaintiff is entitled to the portions of the briefs

Exchequer.
1870.

used at the trial that consisted of the evidence connected with the plea of privilege, as well as the plea of justification.

4th.—That the plaintiff is entitled to the brief furnished to counsel, together with the brief of the report of the trial in the Common Pleas, and to full fees paid to counsel with the briefs.

5th. That the plaintiff is entitled to the subpœna and service upon the witness Lafarelle.

It is, therefore, ordered by the Court that the several bills of costs be, and the same are hereby referred back to the said Taxing Officer for his re-consideration and the re-taxation thereof in accordance with the above declarations, and that each party do abide his own costs.

Motion granted (1).

Attorney for the plaintiff: *Thomas Johnston.*

Attorneys for the defendant: *Meade & Colles.*

Rolls.
1870.

DE BURGH v. CHICHESTER.

(*By permission, from I. R. 4 Eq. 623; s. c. 5 Ir. L. T. R. 1.*)

Nov. 7, 9.

Practice—Taxation of Costs—162nd General Order of 1843—Minor Respondent—One Set of Costs to Tenant for Life and Remainderman, where Interests identical.

Where the interests of a tenant for life and remainderman in a suit affecting the estate are identical, and they appear by the same solicitor, they should join in their answer, and appear by the same counsel at the hearing. They will be allowed but one set of costs, on taxation, under the 162nd General Order of 1843, though the remainderman be a minor, and defends by guardian.

On the 23rd of April, 1870, the Lord Chancellor made an order in the matter of Ulysses Herbert Hussy De Burgh, a minor, that Master Murphy, the master in the minor matter, be at liberty to sign requisitions to one of the Taxing Masters of the Court to tax, as between solicitor and client, the bill of costs furnished to the

(1) The result of the re-taxation made in pursuance of the above order was to increase the plaintiff's costs by the sum of £57 18s. 8d., and to reduce the defendant's costs from £45 15s. 3d. to £2.

petitioners by the Messrs. Stapleton, solicitors, on behalf of Mary Chichester, Charles Rawleigh Chichester, and others, respondents in the cause petition matter of *De Burgh v. Chichester*, amounting to the sum of £204 2s. 4d.; and the bill of costs furnished to the petitioners by the solicitors on behalf of Christine Chichester and others, infants, by Charles Rawleigh Chichester, their guardian *ad litem*, respondents in the said cause petition matter, amounting to the sum of £85 16s. 10d., or so much of said bills of costs as come within the provisions of a deed of indemnity bearing date the 5th of December, 1844.

Master Gibson taxed the costs, and struck off from the bill of costs lodged for taxation on behalf of the minors, the items Nos. 7 to 67, inclusive, being the costs of answering the cause petition, and of appearing by counsel at the hearing of this matter.

A motion was made on behalf of the four minor respondents that Master Gibson be directed to allow to the said respondents the costs disallowed by him. The application was originally made on the 27th June, 1870, when his Honor referred it to the Taxing Master to certify his reasons for disallowing the costs. The Master gave the following certificate:—

“I certify that the suit in *De Burgh v. Chichester* was instituted to raise a charge which affected certain estates in the County of Limerick which belonged to Mr. De Burgh. With a view to a sale, to clear this estate of this charge, he appointed same to certain of his children who executed a release thereof, and thereupon he conveyed said estate to Mr. Balfe absolutely, and freed from said charge so appointed and released; but at the same time he conveyed certain estates in the County of Kildare by way of indemnity, in order to protect Mr. Balfe and the lands so purchased by him from said charges so released, in the event of said release being questioned. Mr. Balfe entered into possession of the Limerick estates so conveyed to him, and continued in such possession till his death; and previously thereto he made his will, and devised said estates to five different persons for life, with remainder to the issue of said devisees in tail. The said lands were afterwards divided by partition between the said devisees.

“This suit was instituted by the children of De Burgh, the vendor to Balfe, to set aside the deed of release, and to raise said

Rolls.
1870.

charge notwithstanding the same out of the estates so conveyed to Mr. Balfe, and the respondents were the several devisees of Balfe, the purchaser, whether entitled for life or in remainder, and the real and personal representatives of the original vendor. Two of the persons interested in portions of said lands under the will of Balfe, the purchaser, and the partition between his devisees were represented in said cause by Mr. Dillon; and two other devisees, also entitled to a portion for their respective lives, and their first sons, entitled in remainder, were represented by Mr. Stapleton, as their solicitor. From an examination of the papers, I am satisfied that Mr. Stapleton acted perfectly *bonâ fide*, and, so far as I can judge, without any desire to incur any costs which could fairly be avoided. He was solicitor for Mr. Chichester, who was tenant for life to a portion of the estate, with remainder to his son, and for Mr. De Morel, who was tenant for life, with remainder to his son. One answer was filed for the two tenants for life, who were represented by the same counsel on the hearing, and one answer for the remaindermen, who were also represented by counsel at the hearing. The respective fathers were appointed guardians *ad litem* of their respective sons.

“It appeared to me that the remaindermen should have joined in the answer of the tenants for life; that there should have been one answer for the two tenants for life and the tenants in tail, and that all should have been represented by the same counsel appearing.

“A decree was made against all the defendants for payment, and in default thereof a sale. The costs have been taxed at the instance of the owners of the indemnity lands, who proposed to pay off the said charge, in exoneration of the said lands, in order to prevent proceedings on foot of the indemnity.

“I heard the case fully argued by Mr. Sherlock, for Mr. Dillon; Mr. White, for Mr. Stapleton; and Mr. Rogers, for Mr. De Burgh; and I felt bound, on the authorities cited to me, and the due exercise of my discretion under the 162nd General Rule of 1843, and a precisely similar rule in England, to tax the costs as if all Mr. Stapleton’s clients joined in one answer, although satisfied that the course taken by the solicitor for said parties was *bonâ fide*, but, in my judgment, unnecessary.”

The motion to review the taxation was now renewed, on the Master's certificate, by

Rolls.
1870.

Mr. Palles, Q.C.:—

This case does not come within the 162nd General Order of 1843. That order was framed to prevent formal parties, or parties who have identically the same interests—such as co-trustees, or executors, or joint tenants—from accumulating costs, by filing separate answers, and appearing by separate counsel at the hearing. Where they do file separate answers, the onus is cast on them by the order to show that it was necessary to do so. *Primâ facie* the Master is to allow two sets of costs, unless he comes to the conclusion, on consideration of the case, that he ought to allow but one set. The position of an infant is an anomalous one, and is so considered by the Court: *Gaunt v. Taylor* (1). Everything must be proved against him, and he is not bound by any admission. Even on a consent to admit formal documents to the hearing, the Court requires counsel to appear for him—to examine into the case, and to state that it is for his benefit that the consent should be made a rule of Court—and counsel for him must come to the hearing perfectly independent and unfettered by the defence of any other person being joined with that of his clients. If there are witnesses to be cross-examined he should cross-examine them.

[The MASTER OF THE ROLLS.—Can you suggest any possible view in this case in which the interests of the minors respondents could conflict with that of the tenants for life?]

Though none can be suggested, circumstances might have arisen in the progress of the cause in which a conflict of interests might have arisen. If the minors had appeared by separate solicitors, separate costs would have been allowed: *Hoops v. Lord Kingston* (2). The General Order of 1868 was made after the decree in this case was pronounced.

Mr. Rogers, Q.C., and *Mr. E. Gibson, contra*:—

Whether the case falls within the 162nd General Order of 1843 or the 7th General Order of 1868 these costs should be disallowed. So far from there being a conflict, there was such complete identity of interest between the tenants for life and the

(1) 2 Beav. 346.

(2) 11 Ir. Eq. R. 469.

Rolls.
1870.

minor remaindermen that the Court appointed the former the guardians *ad litem* of the latter: *Hamilton v. Patten* (1); *Farr v. Sheriff* (2); *Brown v. Gallatly* (3).

Mr. P. White, in reply :—

The true test whether these costs should be allowed is whether they would be allowed under the deed of indemnity. We contend that they would be allowed under the deed of indemnity; for they were incurred *bonâ fide*, as the Master certifies they were: *Ibbett v. De la Salle* (4); *Toplis v. Grane* (5).

Nov. 9.

THE MASTER OF THE ROLLS :—

A motion has been made in this case to review the taxation of costs by Master Gibson. The Master disallowed certain items in the bill of costs. I allowed the case to stand for judgment, anxious, if possible, to allow the items struck off. I cannot, however, do so. I am compelled to affirm the Master's decision.

The bill of costs came before the Master in a very peculiar manner. He has stated very clearly in his certificate the circumstances of the case, and how the costs came before him for taxation. They were shortly these:—The suit of *De Burgh v. Chichester* was instituted to raise a charge which affected certain estates in the County of Limerick, originally belonging to Mr. De Burgh. With a view to clear the estate of this charge, Mr. De Burgh had appointed it to his children, who released the charge. The estate was sold, and conveyed to Mr. Balfe as absolutely freed from the charge; but, at the same time, Mr. De Burgh conveyed certain estates in the County of Kildare, by way of indemnity, in order to protect Mr. Balfe from the charge so released. The petition prayed that the appointment and release might be set aside, and the charge raised out of the lands sold to Mr. Balfe. The right of the petitioners to recover the charge against those lands was established; and the result of the suit was that the indemnity lands were liable to be resorted to to recoup the loss to the sold lands, including the costs of the parties claiming under Mr. Balfe in the cause of *De Burgh v. Chichester*. Mr. Balfe had devised

(1) 1 Ir. Eq. R. 341.

(2) 4 Hare, 512, 528.

(3) 15 W. R., 1877.

(4) 30 L. J. N. S. Ex. 44.

(5) 9 L. J. N. S. C. P. 180.

the sold estates to different tenants for life, with remainders to their issue in tail, and they were all made parties to this suit. Two of the tenants for life and their sons, entitled in remainder, were represented by the same solicitors—Messrs. Stapleton. One answer was filed for the two tenants for life, who were represented by the same counsel at the hearing; and one answer for the remaindermen, both minors, who were represented by separate counsel at the hearing. The tenants for life were guardians *ad litem* of their respective sons. The parties entitled to the indemnity lands came in before the Lord Chancellor to ascertain the costs to which they were liable, and the Lord Chancellor made the order of the 23rd of April, 1870, which order directed the taxation as between solicitor and client of the bill of costs furnished by the Messrs. Stapleton on behalf of the tenants for life, and the bill of costs furnished by the same solicitors on behalf of the minor remaindermen, or so much of said bills of costs as came within the deed of indemnity.

It is contended that the costs of the remaindermen, which were disallowed by the Taxing Master, were costs properly and necessarily incurred under the indemnity deed, and should have been allowed as such, and that in this view the Taxing Master had no discretion but to allow them, there being no doubt that the costs were incurred *bonâ fide*. I cannot yield to this argument. The object of the application to the Lord Chancellor was to ascertain the costs to which the parties entitled to the indemnity lands were liable. It was for this purpose the order of reference for taxation was obtained, and the limitation in the order was simply to prevent any costs being obtained, except such as were within the indemnity deed, but such as were within the deed were to be taxed as directed. Therefore, the question, I think, comes back to a simple question of taxation.

Now, all that the owners of the Balfe estate were bound to do in the suit of *De Burgh v. Chichester* was to make a *bonâ fide* defence; and this was, in my opinion, one of the cases in which one defence for all the parties, tenants for life and remaindermen, would have been the right course. All they had to do as between them and the owners of the indemnity lands was to make a *bonâ fide* defence, and for that purpose one answer would have been

Rolls.
1870.

amply sufficient. The tenant for life put in one answer, and a separate answer was put in for the minor remaindermen. The Master, when he came to tax the costs, found that the Messrs. Stapleton were acting for all these parties, and this being so he acted under the 162nd General Order of 1843. I think the case must be disposed of on that Order; for, although the latter Order of 1868 was made before the costs were taxed, they had been incurred before it came into operation. The 162nd General Order is in these words:—"That in taxing costs between party and party, where joint executors or trustees, being mere formal parties, file separate answers, the Master shall allow but one set of costs for such defendants when he is of opinion that they ought to have joined in one answer, such costs to be apportioned among them as the Master shall deem just; and when the same solicitor is employed for two or more defendants, and separate answers shall have been filed, or other proceedings had by such defendants separately, the Master, on taxation of costs either between party and party or solicitor and client, shall, when he shall so think proper, disallow any portion of the costs occasioned by such separate answers or proceedings as he shall deem unnecessary or improperly incurred." That Order is plainly divisible into two parts—the first part is not applicable to this case; but the latter portion of the Order applies to every case where the same solicitor is acting for two or more parties. The object of the Order was to prevent a solicitor who was acting for two or more parties from availing himself of his position to make unnecessary costs. The necessity for it is obvious: a solicitor acting for tenants for life and remaindermen might get paid three or four times over for the same business. That is the reason why the General Order was made. Master Gibson, who has had great experience, came to the conclusion that these costs were *bonâ fide* incurred, but that they were unnecessary, because the interests of the tenants for life and remaindermen were identical in every possible way. During the argument I asked counsel for the appeal to point out in what respect their interests were not identical, and counsel frankly answered that they could not do so. Indeed, so identical were the interests in this case that the tenants for life, who were the parents of the minor defendants, were appointed their guardians

ad litem. This in itself is a very decisive circumstance; for it is the settled practice of the Court not to appoint any person guardian *ad litem* for a minor whose interest is in any way conflicting with the interest of the minor.

Rolls.
1870.

I think, therefore, that the Master has exercised a sound discretion in disallowing these items of costs as being unnecessarily incurred. I must, therefore, refuse the motion, with costs.

Solicitors for the minors: *Messrs. E. & G. Stapleton.*

Solicitors for the trustees of U. H. De Burgh: *Mr. T. T. Mecreedy.*

M'MAHON v. NORTH-WESTERN RAILWAY COMPANY.

Com. Pleas.
1870.

(*By permission, from I. R. 5 C. L. 200.*)

Nov. 14.

Costs—Cause of Action—Residence.

A Railway Company “resides” (for the purposes of the C. L. P. Act, Ir., 1856, s. 97) within the jurisdiction of the Civil Bill Court of a County in which it has a station.

To disentitle a plaintiff to costs under that section, the *entire* cause of action must arise within the Civil Bill jurisdiction where the parties reside; and if a contract be entered into outside the jurisdiction to carry to a place within it, the plaintiff will not be disentitled to costs, though the breach of the contract occurred within the jurisdiction.

Cases as to substitution of service distinguished.

APPEAL from the decision of the Taxing Master. The plaintiff had recovered £50 against the Irish North-Western Railway Company, for injury to horses which they contracted to carry from a place in the County of Cavan to Castleblaney in the County of Monaghan. The Court subsequently reduced the damages to 1s., considering the evidence not sufficient to connect the damage with the negligence. The contract was entered into in the County of Cavan, the plaintiff resided in the County of Monaghan, and the defendants had a station within the same Civil Bill jurisdiction. Before the Taxing Master it was argued that the case came within the 97th section of the Common Law Procedure Act (Ireland), 1856; that the parties both resided within the jurisdiction of the Civil Bill Court of the county in which the cause of action arose,

Com. Pleas.
1870.

and that the plaintiff was not entitled to any costs. The Taxing Master allowed half costs, and from his decision the present appeal was taken.

Boyd, for the defendants:—

The 97th section of the 19th and 20th Vic., c. 113, Common Law Procedure Act, 1856 (Ireland), provides that where “the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, and not more than £20 is recovered in contract, or than £5 in *tort*, the plaintiff shall not be entitled to any costs.” It is settled by decisions in this country, both on the old Civil Bill Act (14 & 15 Vict., c. 57, s. 40), *Evans v. Great Southern and Western Railway Company* (1), and on this Act, *D'Arcy v. Hastings* (2), that a station of a railway company, where they issue tickets, &c., is a “residence.” And it is laid down in the latest English authority, *Jackson v. Spittall* (3), reversing the previous cases, that “cause of action” in the 18th section of the Common Law Procedure Act, 1852 (England), does not mean both contract and breach: *Powell v. Atlantic Steam Company* (4), *Aston v. London and North-Western Railway Company* (5), and *Betham v. Fernie* (6), were referred to.

Purcell, Q.C., and *Wilson*, for the plaintiff:—

A company has its residence at its head office where it carries on its business; it does not carry on its business everywhere it has a station: *Shiels v. Great Northern Railway Company* (7), *Brown v. London and North-Western Railway Company* (8). That cause of action means entire cause of action for this purpose is settled: *Hurley v. Lawler* (9), *Crowder v. North-Western Railway Company* (10). Cases on the substitution of service rest on a different ground, and the English cases are contradictory. The Queen's Bench, in *Allhusen v. Mulgarejo* (11), and the Exchequer, in *Sichel*

Ante, p. 19.

- (1) 5 Ir. Jur. O. S. 329.
- (2) 10 Ir. C. L. R. App. xxiv.
- (3) L. R. 5 C. P. 512.
- (4) 10 Ir. Ch. R. App. xlvii.
- (5) Ir. R. 1 C. L. 604.
- (6) 4 Ir. C. L. R. 92.

- (7) 30 L. J. Q. B. 331.
- (8) 4 B. & S. 326.
- (9) 6 Ir. Jur. O. S. 344.
- (10) Ir. R. 4 C. L. 371.
- (11) L. R. 3 Q. B. 340.

v. Borch (1), have held that cause of action in the English Common Law Procedure Act means entire cause of action.

Com. Pleas.
1870.

Cur. adv. vu't.

The judgment of the Court was delivered by MONAHAN, C.J. :—

In this case a verdict was had for £50, for breach of contract, which was subsequently reduced by this Court to a verdict for nominal damages. The plaintiff resides in the County of Monaghan; the contract was entered into in the County of Cavan, and the breach sued for occurred in the County of Monaghan. The North-Western Railway Company had an office in Castleblaney, in the County of Monaghan, but their principal office was not in the county.

In this state of facts the Taxing Officer has ruled that the plaintiff, although he recovered only nominal damages, is entitled to half costs. The defendants have appealed from that decision, and contend that the case comes within the 97th section of the Common Law Procedure Act of 1856, which provides that where “the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, and the plaintiff (in an action of contract) shall recover less than £20, the plaintiff shall not be entitled to any costs,” unless the judge certifies.

This question involves two considerations. First, whether the local office of the Railway Company at Castleblaney was a residence within the section; and secondly, assuming it to be so, whether the contract having been entered into outside the jurisdiction of the Civil Bill Court of the county where the parties resided, but the breach having taken place within such jurisdiction, “the cause of action” had arisen in the county within the meaning of the 97th section.

The first provision enacted, disentitling a party to costs, was in the Civil Bill Act of 1851 (14 & 15 Vic., c. 57, s. 40). That provides that if, in any action of contract (except, &c.) brought in the Superior Courts, when the parties *reside* within the jurisdiction of the Civil Bill Court in which the cause of action has arisen, the plaintiff recover less than £20, he shall be entitled to no costs; and in *Evans v. Great Southern and Western Railway Company* (2)

(1) 2 H. & C. 954.

(2) 5 Ir. Jur. O. S. 329.

Com. P'eds.
1870.

it was held on this section that the Company having a ticket office in the county in which the plaintiff resided, the defendants "resided" within the jurisdiction of the county. In that decision reference was made to the 69th section of the same Act, which regulates the Court in which proceedings shall be brought, and provides "that, if any person shall have or occupy any house, warehouse, counting-house, shop, factory, or *office*, for the sale of goods, or for carrying on *any business* in any county, he shall be deemed to have a residence within such county for the purpose of this Act." The former section was repealed, and a new provision enacted by the Common Law Procedure Act, 1856, and then, on the substituted section, the one on which the present question also depends, this Court held, in *D'Arcy v. Hastings* (1), that the 69th section defined what was a residence such as to give the Assistant-Barrister jurisdiction under the 40th section, and that, as the same words occurred in the Common Law Procedure Act, 1856, section 97, as in the 40th section of the Civil Bill Act, being *in pari materia*, they must receive the same construction. That inasmuch as the plaintiff (as to whose residence the question arose in that case) would have been liable to have been sued in the Civil Bill Court, he should have sued the defendant in that jurisdiction, and was therefore disentitled to any costs. We have been referred to a recent case in the Court of Exchequer in this country, *Crowder v. Irish North-Western Railway Company*, which was exactly similar to the present case, and it appears to have been assumed that the Railway Company, having an office within the county, had a residence within the 97th section, and the only question argued was, *whether the cause of action* arose within the county.

Ante, p. 19.

In the English case of *In re Brown v. London and North-Western Railway Co.* (2), decided on the 60th section, 9 & 10 Vic., c. 95, the English County Court Act, which confers jurisdiction on the County Court to issue a summons "in any district in which the defendant shall dwell or carry on his business," it was held that as a Railway Company cannot dwell personally anywhere—"dwell" means the same as "carrying on business"—and that the place where they "carry on their business" is where

(1) 10 Ir. C. L. R. App. xxiv.

(2) 4 B. & S. 326.

they carry on their general business—and that the London and North-Western Railway Company having their principal office at Euston-square, though they had a large station at Chester, could not be sued in the County Court at Chester. The Court in that case rely on the words of the statute being “carry on their business,” not “part of their business;” while the words of the section of the Irish Civil Bill Act, regulating the jurisdiction of the Chairman, are “carry on any business.” We think that in this matter of procedure and practice we should adhere to the decision made in the Irish Courts.

The next consideration is, what is the meaning of “where the cause of action arose?” Is it sufficient that the breach of the contract should have occurred in the county in which the parties reside, though the contract itself be made in another county? That question also first arose in this country on the Civil Bill Act. In *Hurley v. Lawler* (1), the action was for a malicious arrest under a *fiat*. It appeared that the affidavit on which the *fiat* was obtained was sworn in Kerry, and the arrest was also in Kerry, but the judge’s *fiat* was obtained in Dublin; and it was held that cause of action in that Act meant the whole cause of action, and that the whole cause of action did not arise within the County Kerry, and that the section did not apply. That case has been followed in this country, and since the argument in this case, a case has appeared in the Reports, *Crowder v. North-Western Railway Company* (2), in which the Court of Exchequer came to the same conclusion on this section of the Common Law Procedure Act. There could be no appeal from that decision, and we should not consider ourselves bound by it, if clearly of opinion it was wrong, but we concur in that decision on the words of the statute. I am aware that in England it has been held, in *Jackson v. Spittal* (3), that in order to serve a party not within the jurisdiction under the 18th section of the English Common Law Procedure Act, 1852, which enables the plaintiff to do so when “there is a cause of action which arose within the jurisdiction, or in respect of the breach of contract made within the jurisdiction,” cause of action does not mean the *whole* cause of action, contract and breach, but

(1) 6 Ir. Jur. O. S. 344.

(2) I. R. 4 C. L. 371.

(3) L. R. 5 C. P. 542.

Com. Pleas.
1870.

the act on the part of the defendant which gives the plaintiff his cause of action.

But the very elaborate judgment of the Court puts the decision on the ground that the section is not one giving jurisdiction to the Court; that the Court had inherent original jurisdiction, and that it being merely an Act relating to procedure and practice, the Court was bound to give it a liberal construction, so that the Court might be able to proceed with an action in which they have original jurisdiction. We think the decision being rested on those grounds is distinguishable, and following the previous decisions in Ireland, we must refuse this motion, with costs.

Solicitor for the plaintiff: *J. G. Persse.*

Solicitor for the defendant: *A. Boyd.*

Rolls.
1871.

May 1.

In re BEAMISH'S TRUSTS.

(By permission, from 5 Ir L. T. R. 104.)

Practice—Taxation of Costs—Copies of deeds.

No solicitor is bound to send original deeds to counsel. It is his duty to his client to send merely copies. Copies of deeds sent with instructions to prepare a petition should not be utilised for a brief on the hearing of the case, but the deeds should be briefed. The costs of such copies will be allowed on taxation.

A PETITION was filed by Mrs. Beamish and her children on the 27th of January, 1870, for the appointment of new trustees of a settlement dated the 22nd of October, 1842. With the instructions to counsel to prepare the petition were sent copies of the several deeds relating to the trust funds. These deeds were all stated in the petition, but only three of them were taken down on the order, made on the 13th July, 1870, on the hearing of the petition, as having been read. Three other deeds were not so taken down as read. On the taxation of costs the Taxing Master (Mr. Gibson) disallowed the copies of all these deeds, but allowed a "brief copy" of the three deeds entered in the order as read.

W. M. Johnson now moved for a review of the taxation of costs in respect of the items disallowed. It was necessary to state all the deeds in the petition, and accordingly copies of them were required to be furnished along with the instructions to counsel, which copies might also be required for the use of the Court.

HIS HONOR considered that when, under the circumstances of the case, it was necessary in the preparation of the petition to fully instruct counsel as to the deeds relating to the trust property, it would have been a violation of his duty on the part of the solicitor to send the original deeds to counsel. Such a course would involve the risk of their being lost, and the cost of these copies for the purpose of instructing counsel was accordingly most legitimate. The question then was, should these copies be made up in a brief for counsel when the case came into Court, or should these deeds be briefed in addition to the first copies? Copies of deeds were frequently required for the use of the Court, who had to examine into every deed, and frequently to take the copies home to consider their construction and effect. Accordingly there was the necessity that these deeds should be briefed to counsel, and therefore these items, as prayed in the notice of motion, should be allowed with £5 costs. The principle involved in the decision was that no solicitor is bound to send original deeds to counsel, but ought to send copies of them, and in the latter case he is not bound to make such copies into a brief.

Solicitor for the petitioner: *Thomas Ware*.

Solicitor for a minor interested in the trust fund: *A. Nesbitt*.

Com. Pleas.
1871.

PALMER v. GARRETT.

May 4.

(By permission, from I. R. 5 C. L. 412, s. c. 5 Ir. L. T. R. 165).

Costs—Action of Contract—Com. Law Proc. Act, 1853, s. 243—Lodgment in Court—Damages by Verdict—Amount “Recovered.”

If, in an action of contract, the plaintiff obtain, partly by money paid into Court (which he accepts) and partly by verdict, a sum amounting to £20, he is entitled to full costs under section 243 of the Com. Law Proc. Act, 1853; although the contract upon foot of which the money was paid into Court was distinct from that for breach of which the damages were awarded by the verdict.

MOTION, on the part of the defendant, that the Taxing Master should be directed to review his taxation of the plaintiff's costs of the action.

The summons and plaint contained five counts. The first three were for rent, and claimed respectively £37, £26, and £64; the fourth was in contract for breach of agreement to use certain lands, of which the defendant was tenant, in a tenant-like and proper manner; the fifth was in tort for waste; and the damages on foot of the two latter counts were laid at £300. The defendant brought into Court the sums of £37 and £26, in satisfaction of the claims made by the first and second counts respectively, and took defence on the third, fourth, and fifth counts. The plaintiff drew out of Court the sums lodged on the first and second counts, in full satisfaction of his demands thereunder; and took issue on the pleas to the remaining counts. The case was tried before Keogh, J., at the Mayo Spring Assizes, 1871, and resulted in a verdict for the defendant on the third, and for the plaintiff on the fourth and fifth counts, damages being assessed generally at £2. The causes of action stated in the last two counts were substantially the same. The Taxing Master allowed the plaintiff his full costs of the action, and the defendant sought a direction to that officer to allow the plaintiff only half the costs incurred by him in all proceedings taken in the cause after the lodgment in Court and acceptance of the aforesaid sums of £37 and £26.

Monahan, Q.C. (with him *Jordan*), in support of the motion.

The plaintiff has "recovered" only £2 within the meaning of the 243rd section of the Common Law Procedure Act, 1853, for the first and second counts must be regarded as out of the case. Money paid into Court and accepted cannot be said to have been recovered in the action. The plaintiff may, by a construction of the section against which we contend, be said to have recovered more than £20 in contract, but as he has recovered less than £5 in tort, he falls within the section. In *Devine v. London and North-Western Railway Company* (1), where the Court of Queen's Bench were equally divided, the judgments of Lefroy, C.J., and Fitzgerald, J., show that counts in contract and tort in the same plaint are to be regarded, for the purpose of taxation, as different actions. They also cited and relied on *Walsh v. Walsh* (2), *Blackmore v. Higgs* (3).

Robinson, Q.C. (with him *MacDermot*), against the motion.

The verdict being general, some of the damages must be apportioned to the fourth count, which is in contract; and adding what was lodged in Court on the first and second counts to the damages so to be apportioned, as *Arkins v. Armstrong* (4) shows we are entitled to do, we allege that we have recovered more than £20 in contract, and are entitled to full costs. The sums lodged and accepted on the first and second counts have been "recovered" within the meaning of section 243: *Hughes v. Guinness* (5), *Richards v. Black* (6), *Parr v. Lillycrap* (7). *Walsh v. Walsh* (8) was decided on the 126th section of the Common Law Procedure Act, 1853, and is, on that ground, distinguished by Pigot, C.B., from *Arkins v. Armstrong*, which governs the present case.

Cur. adv. vult.

The judgment of the Court was delivered by **MONAHAN, C.J.**:

Having stated the pleadings, his Lordship said:—The fourth and fifth counts are substantially founded on the same cause of action, but the former is framed in contract for breach of agree-

(1) 17 I. C. L. 174.

(2) 17 I. C. L. 195.

(3) 15 C. B. N. S. 790.

(4) 3 I. C. L. R. 373.

(5) 4 I. C. L. 314.

(6) 6 C. B. 443.

(7) 1 H. & C. 615.

(8) 17 I. C. L. 195.

Com. Pleas.
1871.

ment to use certain lands in a proper manner, and the latter is in tort for waste. The result of the action is that the plaintiff has obtained on the first two counts, which are in contract, a sum exceeding £60, which was brought into Court, and which he accepted as sufficient, and on the last two counts a sum of £2. Of this last sum a portion (which, owing to the general manner in which the damages have been assessed, it is impossible to determine) is applicable to the fourth count, which, as I have stated, is in contract. The question is whether, under these circumstances, the plaintiff is entitled to full costs, or to half costs only, under the 243rd section of the Common Law Procedure Act, 1853. Has the plaintiff recovered £20 on contract in this action? Has he a right to add to the sum which he must be taken to have recovered on the fourth count, the amount paid into Court and accepted on the first and second? There are authorities the principles of which are perfectly applicable to this case. In *Hughes v. Guinness* (1), which was an action on a special contract, the defendant paid £6 into Court, and, on an issue as to the sufficiency of that sum, the jury gave the plaintiff £16 in addition. Under these circumstances, the late Mr. Justice Ball and I were of opinion that, as the section did not say “in case the plaintiff shall recover” *by verdict or judgment*—but simply “shall recover”—the sum paid into Court should be looked on as part of the sum recovered in the action and that the plaintiff, having thus recovered more than £20, was entitled to full costs. That decision has never been questioned, and was considered and recognised by the Court of Exchequer in *Walsh v. Walsh* (2). It may, therefore, be taken as settled that “recover” in the 243rd section means to obtain by the general result of the action, and not merely by verdict and judgment. Now, in this case, by verdict on a count in contract, the plaintiff has recovered a small sum, and by payment into Court on certain other counts in contract he has, according to *Hughes v. Guinness*, “recovered” a sum exceeding £60. The general result of the action, therefore, is, that he has recovered on contract a sum far exceeding £20. Now, does it affect the case that the cause of action on which the verdict was obtained consists of a breach of contract different from those declared on in the first two counts, and capable of being

(1) 4 I. C. L. 314.

(2) 17 I. C. L. 195.

made the subject-matter of a separate action? There is no doubt that if an action be brought on several distinct demands in contract, and the plaintiff at the trial recovers more than £20, he is entitled to full costs; and the same rule applies where part of the sum is paid into Court, and the remainder given by the verdict, because the former part has been "recovered" in the action. In our opinion *Arkins v. Armstrong* (1) is decisive on the present application. There the plaintiff recovered £8 by verdict on certain counts in contract, and the defendant had brought into Court £12 in satisfaction of a cause of action stated in another count in contract, and the plaintiff was held to be entitled to full costs. The only difference between that case and the case before us is, that there the plaintiff took issue as to the sufficiency of the money brought into Court, and on that point the jury found against him. The present case is, if possible, more favourable to the plaintiff, because he had accepted the money paid into Court, while in *Arkins v. Armstrong*, as I have said, the plaintiff was defeated at the trial on an issue as to the sufficiency of the money paid into Court. On the argument of that case, the Court of Exchequer was pressed with its decision in *Walsh v. Walsh* (2). The argument of the plaintiff in *Walsh v. Walsh* rested on the allegation that the plaintiff had recovered more than £5 in tort. The Court of Exchequer decided against his claim for full costs, on the ground that the case was governed by the 126th section of the Act of 1853. There are, in the judgment of the Lord Chief Baron, some expressions which might lead to the conclusion that he was of opinion that when a sum of money is lodged in Court and accepted in satisfaction, the cause of action in respect of which it has been so lodged and accepted should be considered to be at an end for all purposes. But in *Arkins v. Armstrong* (3) the Lord Chief Baron points out that *Walsh v. Walsh* turned on the provisions of the 126th section, which prohibits the recovery of more costs than damages in an action for assault and battery, in which the jury shall find the damages to be under the value of 40s. and the Judge shall not certify that the assault and battery were sufficiently proved; and that the judgment in the last-mentioned case contained nothing to prejudge the construction of the

Com. Pleas.
1871.

(1) I. R. 3 C. L. 373.

(2) 17 I. C. L. 195.

(3) I. R. 3 C. L. 373.

Com. Pleas.
1871.

243rd section. On the whole, we are of opinion that the Taxing Master has proceeded on the true principle, and that the plaintiff is entitled to full costs.

Motion refused.

Attorney for the plaintiff : *S. C. M'Cormick.*

Attorney for the defendant : *R. P. Burke.*

Com. Pleas.
1871.

BYRNE v. M'EVOY.

(*By permission, from I. R. 5 C. L. 568; s. c. 6 Ir. L. T. R. 22.*)

Nov. 14.

Costs—Money paid into Court—Counts in Tort and in Contract—Detinue—C. L. P. Act, 1853, s. 243.

Where the plaint contains counts in contract and also counts in tort the plaintiff cannot, for the purpose of entitling himself to full costs, add a sum paid into Court on foot of the counts in contract (which, upon issue joined, the jury have found to be sufficient) to the damages awarded by the verdict on the counts in tort.

Detinue is an action of tort.

MOTION that the Taxing Master be directed to review his taxation, by which he allowed the plaintiff the full costs of the action, and to allow him, instead, half costs only.

The summons and plaint contained a count in contract for money alleged to be due on foot of a mortgage deed, and also counts in trover and detinue for the conversion and detention of the mortgage deed.

In answer to the claims in contract, the defendant paid into Court a sum of £36 2s. 6d., which he alleged was the balance due to the plaintiff on foot of the deed; and he ~~traversed~~ the conversion and detention complained of in the other counts.

The plaintiff took issue on the sufficiency of the sum paid into Court, and on the traverses respectively; and at the trial the jury found that the sum paid into Court was sufficient, and found a verdict for the plaintiff on the issues knit as to the conversion and detention, assessing the damages thereon at one farthing.

The Taxing Master having allowed the plaintiff full costs, the

defendant now sought for a direction to the Taxing Master to allow the plaintiff but half the costs of the action. *Com. Pleas.*
1871.

Armstrong, Serjeant (with him *Daniel*), for the motion:—

In *Arkins v. Armstrong* (1), which will be relied on by the plaintiff as governing this case, the Chief Baron guards himself against applying the rule there laid down to a case like the present.

There the plaintiff recovered, by verdict, a sum of £8 on certain counts in contract, in addition to £20 paid into Court on the other counts, which were also in contract. In *Blackmore v. Higgs* (2), Erle, J., says—"Where there are two causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are, for the purpose of costs, to be treated as being as distinct as if there had been two separate actions." The words of Willes, J., in the same case, are also in point:—"As the plaintiff has failed in establishing his title, I agree with my lord that he cannot better his title to costs, because, in an action which might have been tried in the County Court, he has joined an unfounded claim of title to land." Here the plaintiff has joined to a claim in tort an unfounded claim to something over the money paid into Court on the counts in contract. The principle there laid down governs this case. In *Palmer v. Garrett* (3) something had been recovered by verdict on the counts in contract, and the decision went on the fact; but here the plaintiff has not now "recovered" any sum in contract within the meaning of section 243. The count in detinue is purely in tort. The defendant was not bound by any contract to return the mortgage deed to the plaintiff. The C. L. Proc. Act, 1853, Sched. C., par. 18, describes detinue as "independent of contract." We rely on the judgments of Lefroy, C.J., and Fitzgerald, J., in *Devine v. London and North-Western Railway Company* (4), and on *Walshe v. Walshe* (5). *Farmer v. Fottrell* (6) shows that the plaintiff should not get costs of any proceedings in reference to the counts in contract.

(1) 1 I. R. 3 C. L. 373.

(2) 15 C. B. N. S. 793.

(3) 1 I. R. 5 C. L. 412.

(4) 17 I. C. L. R. 174.

(5) *Ib.* 195.

(6) 8 I. C. L. R. 228.

Com. Pleas.
1871.

Hemphill, Q.C. (with him *Houston*), *contra* :—

Ante, p. 11.

The plaintiff has recovered more than £20 in contract, and is, therefore, entitled to full costs. If it be held that recovery of such a sum by payment into Court alone does not confer a right to full costs, we contend that the action of detinue is not disconnected with contract: *O'Sullivan v. Dublin, Wicklow, and Wexford Railway Company* (1); and that, as the plaintiff must be taken to have recovered something on the count in detinue, he is entitled to add that sum to the amount lodged.

Ante, p. 11.

[MORRIS, J.:—In *O'Sullivan v. Dublin, Wicklow, and Wexford Railway Company* (2), the plaintiff could have framed his action in contract, and was not permitted to gain a right to costs by adopting instead a count in detinue. Here you could not have recovered damages in contract for the non-delivery of the deed.]

Ante, p. 74.

In *Danby v. Lamb* (3) detinue is treated, for purposes of costs, as an action of contract. *Walshe v. Walshe* (4) is not in point, as it was decided on section 126 of the Act of 1853. This case is governed by *Arkins v. Armstrong* (5) and *Palmer v. Garrett* (6). The Act of 1853 permitted the joinder of claims in contract and tort; and to hold that the plaintiff is not entitled to full costs because he has not recovered £5 in tort, while he has recovered more than £20 in contract, would be to treat these proceedings as two separate actions. The decision in *Blackmore v. Higgs* (7) depends on the fact that one count related to matter of title, as to which the inferior Court had no jurisdiction. They cited the judgments of O'Brien and Hayes, JJ., in *Devine v. London and North-Western Railway Company* (8).

The judgment of the Court was delivered by MONAHAN, C.J.:—

In this case the Taxing Master has allowed the plaintiff the full costs of the action; and the defendant now applies for an order that the taxation be reviewed, and the plaintiff allowed only half costs.

[His Lordship, having stated the pleadings and course of the proceedings as above, said] :

(1) I. R. 2 C. L. 124.

(2) I. R. 2 C. L. 124.

(3) 11 C. B. N. S. 423.

(4) 17 I. C. L. R. 195.

(5) I. R. 3 C. L. 373.

(6) I. R. 5 C. L. 412.

(7) 15 C. B. N. S. 790.

(8) 17 I. C. L. R. 184.

Thus, the plaintiff recovered nothing on the counts in contract beyond the sum paid into Court, and the defendant became entitled to judgment on the issues raised on those counts. The plaintiff now contends that he is at liberty to add the sum he has recovered by verdict on the counts in tort to the sum paid into Court on the contract counts, and that he is, therefore, under the circumstances, entitled to the full costs of the action. We are of opinion that this contention is wrong. The cases cited in support of it are cases where both the counts on which payment into Court had been made and those on which the jury gave the plaintiff damages were in contract. In this case the plaintiff has recovered, by verdict, on counts in tort alone; for the action for detainment is an action of tort. Therefore, we do not consider the authorities I have referred to applicable to this case. We are of opinion that the plaintiff cannot add a sum paid into court on account in contract to a sum recovered by verdict on counts in tort; that the Taxing Master has proceeded on a false principle; and that the plaintiff is only entitled to half costs. As the question arises from a mistake of the officer of the Court we give no costs of this motion.

I may mention that a similar application is pending in the Court of Queen's Bench, and that our view of the question coincides with that of the judges of that Court.

Motion granted.

Attorney for the plaintiff: *James Dunne.*

Attorney for the defendant: *James Goff.*

Queen's Bench.
1871.

LEONARD v. BROWNRIGG.

Nov. 23.
Dec. 2.

(By permission, from I. R. 6 C. L. 161; s. c. 6 Ir. L. T. R. 7.)

(Before WHITESIDE, C.J., and O'BRIEN and FITZGERALD, JJ.)

Costs—Money paid into Court—Counts in Tort and in Contract—"Recovering a sum not exceeding £5" in an Action of Tort—C. L. P. Act, 1853, s. 243—C. L. P. Act, 1856, s. 97.

Where the plaint contains a count in contract and also a count in tort, the plaintiff cannot, for the purpose of entitling himself to full costs, add a sum paid into Court on foot of the count in contract (which, upon issue joined, the jury have found to be sufficient) to the damages awarded by the verdict on the count in tort.

MOTIX, that the Taxing Master be directed to review his taxation, by which he allowed the plaintiff the full costs of the action, and that the plaintiff be declared entitled to no costs.

The summons and plaint contained three counts—1st, for trespass on the plaintiff's farm, and ejecting him therefrom; 2nd, for that the defendant became tenant of the same farm to the plaintiff upon the terms that he should use the same in a tenable and proper manner, but had used it in an improper and untenable manner; 3rd, for use and occupation. The defendant pleaded several pleas to the first and second counts, and on the third count paid £30 into Court. The plaintiff took issue on all the pleas, and also on the sufficiency of the money lodged in Court. At the trial it appeared that the defendant had contracted to buy the farm in question from the plaintiff, and, pending the completion of the purchase, had been let into possession; that the purchase afterwards went off, the plaintiff not being able to make title; and that the defendant having refused to deliver up possession the plaintiff brought an ejectment, in which judgment was allowed to go by default. The present action was then brought to recover damages from the defendant for the time during which he had been in possession. The jury found a verdict for the plaintiff on the first count, with £3 2s. 6d. damages. On the issues on the second count they found for the defendant; and they also found that the £30 paid into Court on the third count was sufficient.

No certificate was asked for, or given, by the Judge at the trial; and the parties both resided within the same Civil Bill jurisdiction. The Taxing Master had allowed the plaintiff full costs, being of opinion that he had recovered upwards of £20 in an action of contract; and the present motion was brought to review that taxation.

Queen's Bench.
1871.

Armstrong, Serjeant, and E. Gibson, in support of the motion:—

Money lodged in Court is not “recovered” within the meaning of section 243 of the C. L. P. Act, 1853, and section 97 of the C. L. P. Act, 1856; and so, if there had been no counts in trespass in this action, the defendant, having succeeded on the issue as to the sufficiency of the money paid into Court, would have been entitled to costs under section 78 of the C. L. P. Act, 1853: *Farmer v. Fottrell* (1). Again, if in the present action there had been only the count in trespass, or if the plaintiff had drawn the £30 in full satisfaction of his demand under the third count, the defendant would have been entitled to his costs subsequent to the lodgment: C. L. P. Act, 1853, section 77, and C. L. P. Act, 1856, section 97; but the plaintiff now says that by not drawing out the £30 he has placed himself in a better position, and is entitled to full costs. In *Devine v. The London and North-Western Railway Company* (2) the Court was divided; but the two Judges who held that the plaintiff was entitled to full costs did so on the ground that the trover in that action arose out of contract, and that, therefore, the plaintiff had recovered more than £20 in an action of contract. The case, therefore, is clearly distinguishable from this, where the tort is entirely unconnected with the contract; and the plaintiff has no right to add on the damages recovered under the first count to the money lodged upon the third count. It is plain that the tort in this case is unconnected with contract, because in no possible way could the first count have been framed in contract. They also cited *Pulmer v. Garrett* (3), *Burton v. Ante*, p. 74. *Lowe* (4), and *Blackmore v. Higgs* (5).

(1) 8 Ir. C. L. R. 228.

(2) 17 Ir. C. L. R. 174.

(3) 5 Ir. L. T. 165.

(4) 15 W. R. 791.

(5) 15 C. B. N. S. 790.

Queen's Bench.
1871.

Purcell, Q.C., and Gibbon, contra:—

The real foundation of this action is contract, for the defendant would never have got into possession of the farm but for the contract of sale. In *Frazer v. Quane* (1) and *Legge v. Tucker* (2) the test is laid down to distinguish whether a tort is or is not connected with contract, and, under the authority of those cases, the whole cause of action in this case must be regarded as one. That being so, the money recovered on the first count ought to be added to the money lodged in Court: *O'Rorke v. M'Donnell* (3); *Hughes v. Guinness* (4); *Fewster v. Boggett* (5); *Arkins v. Armstrong* (6); *Walshe v. Walshe* (7); *Owens v. Vanhomrigh* (8). *Farmer v. Fottrell* (9) is distinguishable, because in that case there was but one count. If, however, the first count is to be considered an independent action, the C. L. P. Act allows different causes of action to be joined in one plaint, and the whole action is, therefore, in reality but one; and as the action was rendered necessary by the misconduct of the defendant, it is but fair that the plaintiff should have his costs.

Cur. adv. vult.

Dec. 2. The judgment of the Court was delivered by WHITESIDE, C.J.:—

[The learned Chief Justice having stated the pleadings and the course of the case, proceeded]:—

Upon these pleadings, and under these circumstances, the question for our decision arises upon the first and third counts—whether, having regard to the fact that £30 was lodged in Court upon the third count, and not accepted by the plaintiff, and that a verdict for £3 2s. 6d. was found for the plaintiff on the first count, the plaintiff is entitled to the sum of £73 3s. 7d., being full costs of the cause taxed by the proper officer. It was contended on behalf of the defendant, that by the combined operation of the provisions in the 243rd section of the Common Law Procedure Act, 1853, and the 97th section of the Common Law Procedure Act, 1856, upon the pleadings and findings and facts, the plaintiff was not

(1) 16 Ir. C. L. R., App. xiii.

(2) 1 H. & N. 500.

(3) 13 Ir. C. L. R., App. viii.

(4) 4 Ir. C. L. R. 314.

(5) 9 M. & W. 20.

(6) Ir. R. 3 C. L. 373.

(7) 11 Ir. Jur. N. S. 378.

(8) 10 Ir. Jur. N. S. 297.

(9) 8 Ir. C. L. R. 228.

entitled to any costs; and, on the other hand, it was contended for the plaintiff that he had "recovered" more than £20 in an action of contract within the true meaning of these sections, for that although the finding of £3 2s. 6d. in the case of trespass (the first count) was in tort, yet it was in tort connected with, and springing out of, contract, and that the foundation of the whole action being contract, as contained in the third count, the whole might be considered as one action, in which more than £20 had been recovered; and further, that even if the trespass was disconnected with the contract there was nothing in the Statutes to prevent the plaintiff from adding the £3 2s. 6d. recovered on the first count to the £30 lodged under the third count, and thus, within the true meaning of the Statutes and the principle of decided cases, "recovering" a sum of £33 2s. 6d. in one consolidated action, and so entitling himself to full costs.

Now, if an action had been brought singly upon the contract, as in the third count, and £30 had been lodged in Court by the defendant, and accepted by the plaintiff in full satisfaction of his demand, in such case no judgment would have been marked, and there would be no recovery by judgment; the proceedings would be regulated by the 77th section of the Common Law Procedure Act, 1853, and the plaintiff would be entitled to his costs up to the time of the lodging of the money, and to nothing more.

Suppose, however, as in the present case, a count in tort added to the count in contract upon the same state of facts I have just assumed to exist—namely, a lodgment upon the count in contract, and acceptance thereof by the plaintiff in full satisfaction of his demand upon that count, what, then, would be the result? Why, the count in contract would be considered as struck out of the plaint, insomuch that upon a motion in arrest of judgment it could not afterwards be referred to; and if the plaintiff proceeded to trial upon the count in tort, and recovered a sum not exceeding £5, the case would fall within the provisions of the 243rd section of the Common Law Procedure Act, 1853, as an action of tort merely. Let me now suppose an action, with one count only, in contract, upon which money is lodged in Court; that the plaintiff refuses to accept the money, and proceeds to trial on an issue as to the sufficiency of the money, and is defeated. In such case the

Queen's Bench.
1871.

Queen's Bench.
1871.

plaintiff would not merely lose his costs up to the time of lodgment, which he would have been entitled to under the 77th section if he had accepted the money lodged in full satisfaction, but he would also have to pay the defendant his entire costs of suit without any deduction: *Farmer v. Fottrell* (1). I need scarcely add that if a plaintiff brought an action of trespass singly, and recovered £3 2s. 6d. only, his claim for costs would be adjusted by the 243rd section of the Act of 1853 and the 97th section of the Act of 1856, and that he would be entitled to no costs, or to half costs only, according as the parties might, or might not, happen both to reside in the same civil bill jurisdiction in which the cause of action arose. An attempt was, indeed, formerly made to argue that the Civil Bill Courts had not jurisdiction to try an action for mesne rates—which the first count in the present action was said in reality to be—on the pretence that such an action involved a question of title. It was, however, held, upon appeal, that the judgment and execution in ejectment were conclusive as to the title, and that the action was within the civil bill jurisdiction as an action of trespass: *Doyle, appellant, Feulon, respondent* (2). In the principal case it was argued that this action of trespass was somehow or other connected with contract, but no reason was given for the proposition, and no authority cited to support it; and, on turning to Schedule C to the Common Law Procedure Act, 1853,—“Forms of Pleadings”—we find that the very first precedent in cases of wrongs independent of contract is “trespass of land.” That argument, therefore, disappears. It is, however, contended that a plaintiff, by joining in one plaint counts in tort and counts in contract, can escape the simplicity of procedure and the consequences which exist when there is only one count, and can thus secure for himself costs, which in the present case amount to £72, where for the recovery in trespass in the Civil Bill Court he could not have recovered half as many shillings, and where, suing in the Superior Courts, while he might have sued in the Inferior, he could have recovered for costs—nothing. I should be slow in yielding my assent to such practical injustice. The first step in the process by which this result is obtained is to fall back on the 54th section of the Act of 1853, which provides that causes

(1) 8 Ir. C. L. R. 228.

(2) 1 Cr. & Dix, C. C. 67.

of action of whatever kind (except ejectment) may be joined; but I think that section never was intended to interfere with the questions of costs. Its true meaning and principle is shown in the case of *Blackmore v. Higgs* (1), where an endeavour was made to escape the jurisdiction of the County Court. And Erle, C.J., after pointing out that the plaintiffs had three causes of action, and that they had merely recovered a verdict of 40s. in one, laid it down, that where there were two causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are, for the purposes of costs, to be treated as being as much distinct as if there had been two separate actions, and that the plaintiffs were to be in no better position by joining the whole in one action than if they had brought two actions. [The Chief Justice also referred to the judgments of Keating and Willes, J.J., in that case.] It may be said the judgment of Erle, C.J., applies to and includes a case of several counts upon different contracts. The whole of this reasoning applies, however, with still greater force to a case where trespass and contract are sued for in the same plaint; and rejecting, as I do, the unmeaning distinction between "action" in the 243rd section of the Irish Act, and "cause of action" in the corresponding section of the English Act, I think the legal doctrine laid down by Erle, C.J., contains an exposition of the true principles; that it is directly applicable to the case before us, and should be followed to its legitimate conclusion.

There is a class of cases, such as *Hughes v. Guinness* (2), where it has been held that, where at the commencement of the action the plaintiff's demand was really more than £20 the defendant could not, by a lodgment in Court before trial of part of the plaintiff's demand, deprive the plaintiff of his costs. In that case the action was on a special contract; the defendant lodged £8 in Court, and there was a verdict for the plaintiff for £16 in addition; and under these circumstances the Court of Common Pleas held that the plaintiff was entitled to full costs, and that the meaning of the 243rd section is, that if a plaintiff recovers by force of his action, whether by the verdict of a jury or not, a sum not less than £20 he is entitled to full costs. It is, however,

(1) 15 C. B. N. S. 790.

(2) 4 Ir. C. L. R. 314,

Queen's Bench. 1881. to be observed that the lodgment and the sum recovered by verdict were upon one and the same contract. The principles decided in that case seems to be sustained by the cases of *Fewster v. Boggett* (1) and *Crosse v. Seaman* (2). In *Hughes v. Guinness* it is also to be remarked that the plaintiff did not accept the £6 lodged in Court in satisfaction of his claim. In *Walshe v. Walshe* (3) the action was for assault and battery in one count, and for obstructing a right of way in another. The defendant paid £5 into Court upon the second count, which the plaintiff accepted in full satisfaction of his claim under the count, and went to trial on the first count; the jury found for the plaintiff on the first count, with £1 damages. The Taxing Master having allowed the plaintiff his full costs, there was a motion to review the taxation. Pigot, C.B., in delivering the unanimous judgment of the Court of Exchequer, reviewed all the authorities upon the subject, and after showing that if the plaintiff had not drawn out the money lodged in Court on the second count, but had proceeded to trial, and recovered any damages, however small, on that count over and above the money lodged, a question might have arisen whether the plaintiff had not recovered more than £5 in an action of tort, gives it as his decision that the plaintiff, by drawing the money lodged in full satisfaction of his claim on that count, had virtually struck it out of the summons and plaint, and that the cause of action on the second count was at an end. He, therefore, decided that the plaintiff was not entitled to costs, and declined to consider the case of *Devine v. London and North-Western Railway Company* (4) as having no application to the case before him. It must be admitted that *Walshe v. Walshe*, although well decided, does not exactly govern the question now before us, inasmuch as both the counts were in tort, and the £5 lodged in Court was drawn out by the plaintiff in satisfaction of the cause of action on the count on which it was lodged. As to *Arkins v. Armstrong* (5) and *Blackmore v. Higgs*, in both cases the money was lodged and damages recovered upon counts in contract only, and they, it may be said, are therefore distinguishable from the present case, in which tort and contract

(1) 9 M. & W. 20.

(4) 17 Ir. C. L. R. 174.

(2) 11 C. B. 524.

(5) Ir. R. 3 C. L. 373.

(3) 11 Ir. Jur. N. S. 373.

are united. *Palmer v. Garrett* (1) is also clearly distinguishable, *Queen's Bench*,
 assuming that it is accurately reported. In that case there ^{1871.} *Ante*, p. 74.
 were two counts in contract, upon which the defendant lodged
 £64 8s. 9½*d.*, which sum the plaintiff accepted in full satisfaction
 of his claim under those counts upon which the money was lodged
 in Court. There was also another count in contract and one in tort
 to which the defendant pleaded, and the jury awarded £2 damages,
 in gross, to the plaintiff, and it was held that a portion of this £2
 was to be treated as recovered on each of the two counts in which
 no money had been lodged; that the money lodged in Court was
 to be added to the unascertained portion of the £2, which was
 applicable to the third count in contract; that, therefore, the
 plaintiff had recovered more than £20 in an action of contract,
 and was entitled to his full costs. Now, that singular case had
 obviously no application to the present, in which no more money
 has been recovered by verdict on the count in contract than the
 very sum lodged in Court upon the same count. It would seem
 to me to have been more consonant with justice that—the plaintiff
 in *Palmer v. Garrett* having drawn out of Court and accepted in *Ante*, p. 74.
 in full satisfaction the substantial sum of money for which he
 really brought his action—the case should have been thenceforward
 dealt with as if the first and second counts had been struck out of
 the plaint, and the plaintiff should have been obliged to proceed
 on the other counts at his peril. The last case to which I shall
 have occasion to refer is *Devine v. London and North-Western*
Railway Company (2), in which the Court of Queen's Bench was
 equally divided. [The Chief Justice stated the facts of that case,
 and read and commented upon the several judgments delivered, and
 proceeded.] I think that, although the distinction taken by my
 brother O'Brien may be accurate, and his observations deserving of
 consideration, yet the reasoning of Fitzgerald, J., and Lefroy, C.J.,
 is unanswerable, and applies with great force to the present case;
 for this is an action brought, properly speaking, to recover damages
 for the use and occupation by the defendant of the plaintiff's
 farm during the pendency of a contract to purchase it, and in
 which the jury found the sum lodged in Court to be substantially

(1) 5 Ir. L. T. 165; since reported, I. R. 5 C. L. 412.

(2) 17 Ir. C. L. R. 174.

Queen's Bench.
1871.

sufficient for the real cause of action, but that there might have been a short period of time uncovered by that payment—*i.e.*, the interval between the execution of the *habere* upon an ejectment by the plaintiff and the day of getting actual possession from the defendant; and, as I have already shown, the plaintiff might have brought his action of trespass into the Civil Bill Court for that insignificant demand. I hold that the plaintiff in this case, having been defeated on the issue he took upon the sufficiency of the lodgment by the defendant in Court on the count in contract—his substantial cause of action—cannot be permitted to avail himself of that proceeding, in which he has been defeated, in order to add a sum he might have accepted in the first instance, and which he was ultimately forced by the verdict to accept, to the £3 2s. 6d. recovered on his count in trespass, and thus evade the operation of the 243rd section of the Act of 1853 and the 97th section of the Act of 1856, and, in what is virtually a petty action, mulct the defendant in a sum for costs amounting in the present case to £72. I am certain that in defeating this attempt I am rightly interpreting the intention of the legislators in their efforts to repress petty and vexatious litigation. The motion must, therefore, be granted, and an order made that the plaintiff is entitled to no costs.

Motion granted (1).

O'BRIEN and FITZGERALD, JJ., concurred.

Attorneys for the plaintiff: *Little and Elgee.*

Attorney for the defendant: *W. H. Brownrigg.*

(1) This agrees with the decision of the Court of Common Pleas in *Byrne v. Ante*, p. 78. *M'Evoy*, Ir. R. 5 C. L. 568.

In Re RENEWABLE LEASEHOLD CONVERSION ACT,
Ex parte HUTCHINSON.
 HONE *v* HUTCHINSON.

V. C. Court.
 1872.

May 27.
 June 18.
 July 1.
 Nov. 18.

(*By permission, from I. R. 7 Eq. 56*).

Taxation of Costs—Renewable Leasehold Conversion Act (12 & 13 Vic. c. 105; s. 33)—Correspondence prior to Filing of Petition—Exhibits not taken down on order—Duties of Taxing Master—Practice.

Where a petitioner under the Renewable Leasehold Conversion Act established his right to a fee-farm grant, but was ordered to pay the respondent's costs of the matter :—

Held, 1. That the Court had no discretion, under section 33 of the Act, to include in such costs those of proceedings that had taken place out of Court before the presenting of the petition and were not connected with its preparation. 2. That the respondent was entitled to the costs of the briefs of such documents-as, though not taken down on the order as read, the Taxing Master, in his discretion, should consider to have been necessary to support the application.

In the case of motions and summary petitions, the affidavits on which the proceeding is grounded are alone taken down on the order, leaving it to the discretion of the Taxing Master to determine what other documents (if any) connected with the case should be allowed for in the costs. It is his business solely to adjudicate upon such questions, and exercise his discretion in respect of them.

MOTION for taxation of costs.

The facts which gave rise to the present motion are reported in detail, I. R. 6 Eq. 34. The Vice-Chancellor, by an order dated the 20th November, 1871, directed the respondent, Hone, to execute a fee-farm grant to the petitioner on the terms therein mentioned, and that the petitioner should "pay the respondent the costs of this matter, up to and including this motion and order, when taxed and ascertained."

May 27.

While the costs were accordingly before Master Teeling for taxation, the respondent served on the petitioner notice of motion for the 27th May, 1872, to the following effect :—

1. That the said Taxing Master "be at liberty to tax and ascertain the costs properly and necessarily incurred by the said respondent prior to the filing of the petition in this matter in connection with the drafts of the fee-farm grant to the petitioner, in

V. C. Court, 1872. the proceedings in this matter mentioned, and that the petitioner be directed to pay such costs when taxed and ascertained."

2. "That the said Taxing Master shall be at liberty to allow to said respondent the costs of briefs of the several exhibits referred to in the affidavits (of the respective solicitors of the parties), used on the hearing of the petition in this matter."

3. "That the said respondent be declared entitled to the costs of the approval of the draft of the fee-farm grant which has been settled and agreed upon between the parties, and of the execution of the said grant, when taxed and ascertained, and that the petitioner be directed to pay the same, or, that the order made in this matter, dated the 20th day of November, 1871, be amended in the above particulars."

The affidavit of the respondent's solicitor (filed May 23), on which the motion was grounded, stated that the Taxing Master had taken off his bill of costs items 1 to 85 (inclusive), being mainly the costs of the briefing of the correspondence which had passed between the parties relative to the questions at issue between them, prior to the filing of the petition; that the Taxing Master had also "intimated that he should disallow so much of the respondent's briefs as consisted of the several exhibits referred to in the affidavits of the petitioner's and respondent's solicitors, read on the hearing of the petition in this matter, as were not taken down on the said order;" and that the draft of the proposed fee-farm grant had been agreed upon after the said order was made, so that it became unnecessary to have said draft settled in Chambers [which the order of November 20th had directed to be done in case the parties should differ as to its form].

Mr. Murray, for the respondent, Anne Hone:—

Section 33 of the Act under which this petition was presented (12 & 13 Vict. 105) provided that "the costs of all proceedings by and under any petition presented under this Act shall be in the discretion of the Court." See also 1 Lat. Furlong, 328, referring to *In re Hull's Estate*, cited in Adair on Costs (Corrigenda et Addenda). There is no analogy between a petition under this Act, and a bill, as to the incidence of costs. A grantor is entitled to his costs of investigating the grantee's title.

Mr. F. Walsh, Q.C., and *Mr. Peet*, for the petitioner, Sir Edward Hutchinson :— *V. C. Court.*
1872.

The respondent should have applied for these costs at the hearing of the petition. The order limits them to “costs of this matter.” Those now asked for are unreasonable. *Calvert v. Godfrey* (1), as to a vendor paying costs where he fails to make a good title; and *Boyd v. Belton* (2), where Lord Chancellor Sugden very unwillingly gave to a defendant (on a subsequent motion, on the terms of his paying the costs thereof, and under peculiar circumstances) certain costs which he should have asked for at the hearing. See also *Renewable Leasehold Conversion Act, ex parte Keatinge* (3).

THE VICE-CHANCELLOR :—

The notice of motion in this case deals with three separate subjects. The first is as to the costs incurred by the respondent, prior to the filing of the petition, in connexion with the drafts of the fee-farm grant. The 33rd section of the Renewable Leasehold Conversion Act, which gives the Court jurisdiction as to costs, is confined to the costs of proceedings by and under the petition, and I do not think that proceedings that took place out of Court before the presenting of the petition, and not connected with its preparation, can be held to come within that section. In general, I think that a lessor is entitled to be paid, by the person claiming a grant, his costs reasonably and properly incurred in reference to that grant, to the same extent at least as he would be entitled to claim if granting a renewal; but these are not costs of the proceeding here, and the lessor should have asked, when the case was at hearing before me, that the payment of them should have been made a condition precedent to the executing of the grant. I am now called upon to go back on the case and consider this matter on its merits, which I decline to do, and I shall, therefore, make no rule on this part of the motion.

The next subject of the notice has reference to the costs of the proceedings under my order declaring the respondent entitled to her costs in this matter, and is a question of items of allowance. This is, in the first instance, a question for the Taxing Master. I do not think I could have made my order without seeing the deeds

(1) 6 Beav. 97.

(2) 8 Ir. Eq. R. 113.

(3) I. R. 2 Eq. 26.

V. C. Court.
1872.

as to which the question now arises; but as I consider that the application with respect to these costs should be made after the costs have been certified, and by way of motion to review the taxation, I shall make no rule upon it at present.

The last question raised by the notice is as to the costs subsequent to the date of my order. The proper course to be taken by the respondent appears to me to be a decline to execute the grant unless she is paid such costs as she considers herself entitled to, and if the petitioner refuse to pay them and applies for an order to have the grant executed, I shall then consider and decide the question, and shall make the payment of such costs as I shall think the respondent justly entitled to part of the terms of executing the grant.

As for amending the order by introducing into the readings upon it the documents of which the respondent claims to have the costs, I shall not vary the practice which has prevailed in this Court, and, as I am informed by the Registrar, also in the Rolls Court, namely, to take down on the order only the affidavit which traces the petitioner's title, and the instrument or instruments which create the right of renewal. It is then for the Taxing Master to say what deeds (if any) showing the derivation of title, or appearing otherwise proper for the parties to copy in counsel's briefs, should be allowed. I shall, therefore, make no rule at present on this point also. It is right to mention that the solicitor applied to the Registrar at the time to have the documents in question taken down on the order, which he properly refused to do, the practice being as I have already stated.

I shall reserve the costs of this motion.

June 18.

Before the 18th of June, 1872, the Taxing Master certified the costs, and the case having again appeared in the Vice-Chancellor's list on that day, without any regular notice having been served His Honor directed notice to be served on the petitioner of a motion to review the taxation of the costs. That motion (in pursuance of such notice, dated 21st of June) came on for hearing on the 1st of July, when it appeared from an affidavit filed (23rd June) by the respondent's solicitor that he had since been paid the costs relative to the approval and execution of the fee-farm grant, and

July 1.

that the respondent having accordingly executed the grant, the third branch of the motion of May 27th was thereby disposed of. The present notice referred only to the "exhibits" mentioned in the second branch of that notice, which had been disallowed by the Taxing Master.

V. C. Court.
1872.

The VICE-CHANCELLOR (after consultation with the Assistant-Registrar, Mr. F. B. Martley) stated he would send the case to the Registrars and Master Teeling for them to report respectively on the practice.

The following reports were subsequently made by the Taxing Master and the Registrars respectively:—

"In pursuance of your Lordship's directions, bearing date the 5th day of July, 1872, calling on me for a certificate as to my taxation of the items of the costs of Mrs. Anne Hone, specified in the notice of motion dated the 21st day of June, 1872; for a review of my taxation of said items, I have to report accordingly that the items claimed by the said notice were briefs of certain letters or exhibits referred to in the affidavits of J. H. Townsend and R. J. Hone, read on the hearing of the petition in this matter, and which exhibits I disallowed in consequence of no reference whatever being made to them in your Lordship's order of the 20th day of November, 1871; the practice on taxation being not to allow briefs of documents which are not taken down in the order made by the Court.

"JOHN J. TEELING.

"Dated 7th November, 1872."

"CHANCERY REGISTRAR'S OFFICE,

"16th November, 1872.

"The Registrars understand that the Vice-Chancellor desires to be informed as to the practice observed in entering, on orders made by the Court on motion or petition, documents referred to as exhibits in affidavits used before the Court, and beg to state as follows:—

"Formerly, when the taxation of costs was committed to the Masters in Ordinary, as the Registrars understand, it was not the practice to enter on orders any other documents than the affidavits

V. C. Court. 1872. filed for the purpose of the motion, save in exceptional cases when the probate of a will, for example, was the ground of the motion ; the Masters always exercising their discretion and judgment as to the documents which, upon taxation, they would allow to the parties.

“ But in late years a new practice has sprung up in the Taxing Masters’ office, *not to allow briefs of documents which are not taken down in the order made by the Court.* This practice has involved the Registrars in great difficulty. They have been pressed to enter on the orders a variety of documents named as exhibits, and alleged to have been briefed, and to be necessary for the assistance of counsel and of the Court, in order that, on taxation, the solicitors may not be disallowed the costs of briefing the same under the above-mentioned rule of practice.

“ The Registrars consider the exhibits (properly made such) are incorporated with the affidavits, and technically and sufficiently recorded as being before the Court by the entry of the affidavits.

“ It is not the province of the Registrars to examine the briefs prepared for the motion, or to judge which of the several documents were properly included in the briefs for counsel. This is essentially the duty of the Taxing officers, who are constituted the judges of the necessity and relevancy of the documents ; and such duty was always, as the Registrars believe, discharged by the Masters in Ordinary, when they taxed bills of costs. If the Registrars were to discharge this duty it would involve the necessity of examining the documents and the affidavits proving same, generally after the discussion upon the order is over, and in the absence of the party to be affected.

“ The Taxing Masters act in the presence of both parties ; they are provided with large powers of calling for documents, and taking evidence on oath, to inform their judgments and enable them to ascertain the relevancy and importance of the documents sought to be included in the briefs, as well as how and when the briefs were prepared.

“ In consequence of the present practice, it constantly occurs that, months after an order has been made, it becomes necessary to apply to amend the order, by introducing some deed which through some inadvertence has been omitted. This necessitates a

motion to the Court, involves the judge in a re-discussion and re-hearing of the motion, and entails useless and unnecessary expense. *V. C. Court.*
1872.

“The Registrars cannot think that the practice, stated by Master Teeling, of adopting implicitly the list of documents mentioned by name in the order, as the rule for allowance or disallowance, was the practice of the Taxing Officers in Ireland or in England in former times, or that it is a safe or satisfactory rule to adopt.

“WM. D. FERGUSON,

“WM. B. DRURY.”

The adjourned motion having come on for hearing on this day, Nov. 18.
Mr. Murray, for the respondent, cited *Freer v. Rinner* (1) as to its not being necessary that all the affidavits filed on a motion should be read in order to entitle the successful party to the costs of them.

Mr. F. Walsh, Q.C., and *Mr. Peet* for the petitioner.

The order of November 20, 1871, merely refers to the affidavits themselves, and does not mention “the documents therein referred to.” The respondent has instituted this expensive motion to recover £6 10s., which was the portion of the bill of costs (amounting to £13 14s. 8d.) struck off by the Taxing Master in relation to the exhibits. The circumstances of *Freer v. Rinner* are not sufficiently stated in the report of the case for the decision there to be any guide in the present instance.

THE VICE-CHANCELLOR:—

This case, as involving a question of every-day occurrence, is of considerable importance; and since it appeared to me that the practice adopted by the Taxing Master, as stated when this case was previously before the Court, leads to inconvenient results, I caused special inquiries on the subject to be made both from the Taxing Masters and the Registrars, and I have received their reports. Immediately after the petition matter was disposed of, the petitioner’s solicitor applied to the Registrar of this Court to

V. C. Court.
1872.

have the documents as to which the dispute has now arisen entered on the face of the order, when he was informed that in the case of motions and summary petitions the affidavits on which the proceeding is grounded are alone taken down, leaving it to the discretion of the Taxing Master to determine what other documents connected with the case should be allowed for in the costs. I am informed that such was the practice followed by the late Master Gibson, one of the most able and experienced officers of this Court. [His Honor, after producing and reading the respective reports of the Taxing Master and the Registrars as above set out, continued.] I entirely concur in the views here stated by the Registrars, and the reasons they assign for them. If the rule of the Taxing Master were adopted it would be necessary for the Judge in any such case to decide as to each document whether it would be inserted on the order—a course which, if adopted, would render it almost impossible to discharge the duties of the Court. Nor should the Registrar, whose time on these occasions is fully occupied with his proper duties, be required to undertake this duty also. It is the business of the Taxing Master solely to adjudicate upon such questions and to exercise his discretion in respect of them. I shall accordingly direct him to review his taxation in this case by allowing the costs of the briefs of such documents as he in his discretion shall consider to have been necessary to support the application; it is not for me to pronounce upon them.

I shall give no costs of this motion.

Counsel for the petitioner submitted that the respondent, who had brought their client into Court so often and so unnecessarily, should pay the costs which had been reserved on the 27th of May; and, besides that, the present motion instituted by him, and clearly irregular, had failed.

Mr. Murray, for the respondent, argued that the costs reserved on the 27th of May referred to those branches of the motion of that date as to which the Court had reserved its decision, and that as to the rest of the motion no rule had been made.

The VICE-CHANCELLOR, after recapitulating the different steps in the case, stated that, inasmuch as the respondent had succeeded in part and failed in part, no costs should be given to either side.

V. C. Court.
1872.

Order accordingly.

Solicitor for the petitioner: *Mr. J. H. Townsend.*

Solicitors for the respondent: *Messrs. Falkiner & Hone.*

HASLAM v. O'CONNOR.

V. C. Court.
1872.

(By permission, from I. R. 6 Eq. 615).

June 3, 24.

Taxation of Costs—Third Counsel—Briefs of Documents—Practice.

1. The bill having been dismissed with costs, after a hearing of fourteen days' duration, in a suit in which nineteen individuals and two companies—who had to a great extent a common case—were defendants, and some of them had justifiably answered separately, and had severally appeared by three counsel, two only of whom were heard for each defendant or set of defendants:—The Court refused, in the instance of an individual defendant, to review the taxation whereby the costs of the third counsel were disallowed by the Taxing Master as between party and party.

2. Where one party, by his pleading, puts in issue documents which the other may reasonably expect would be read in evidence, and he, accordingly, has them briefed to his counsel, the Taxing Master ought, in the exercise of his discretion, and having regard to the probable materiality and relevancy of those documents to the case as pleaded, to allow the costs of the briefs containing them, if he considers that the party was justified in having them briefed; even though they were not read in evidence at the hearing.

MOTION FOR REVIEW OF TAXATION OF COSTS.—Bill filed on the 19th February, 1869, by a shareholder of the Dublin, Wicklow, and Wexford Railway Company, for the purpose of obtaining relief against several of their Directors and others in respect of extensive and complicated transactions, which are reported in detail in *Power v. Hoey* (1), and *Power v. O'Connor* (2). It was amended on the 31st March, 1870; and the case having come on for hearing on replication before the VICE-CHANCELLOR on the 7th February, 1871 (when it occupied the Court for fourteen days), the bill was dismissed with costs by His Honor's decree of the 23rd May, 1871

(1) 19 W. R. 916.

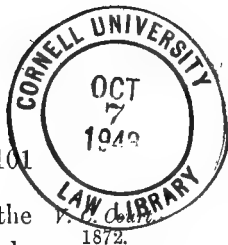
(2) *Ibid* 923.

V. C. Court.
1872.

(subsequently affirmed by the Court of Appeal in Chancery). There were, besides the Company, and the Royal Bank of Ireland, nineteen defendants, seven of whom (being the plaintiffs in *Power v. Hoey*) joined in their answer. The remainder (including the Hon. F. G. Ponsonby, as to whose costs the present question arose) answered separately, with the exception of two officers of the Royal Bank, who joined, and the Company, and the personal representative, and two trustees, of the creditors of William Dargan, who filed no answer. The twentieth paragraph of the amended bill, after referring to certain "claims" put forward by several of the directors in the suit of *Hoey v. Boyle*, which had been instituted to administer William Dargan's estate, stated, "The plaintiff refers to and puts in issue the pleadings and proceedings in the said suit, the said claims, and the affidavits and other evidence used in the said suit in support of, and in opposition to, the said claims." On the 19th December, 1870, the defendant, Ponsonby, served a notice on the plaintiff to particularise the "pleadings, &c.," that would be relied on, to which the plaintiff replied on the 21st, giving notice that he would rely on the bill and answer in *Hoey v. Boyle*. The answer of the defendant, Ponsonby, was signed by a second senior counsel, who also appeared for him at the hearing; and the present question was, whether the fees of such third counsel, and the costs of briefing the said pleadings, had been properly disallowed by the Taxing Master.

The report of the Taxing Master (Mr. Teeling), to whom the VICE-CHANCELLOR directed the case to be remitted in the first instance, stated as follows:—

1. That he had disallowed the costs of a second senior counsel's approving of the defendant Ponsonby's answer. (a) "In pursuance of the general practice on the taxation costs, which is, that between party and party such costs are not allowed;" (b) because "there is no specific provision in the schedule of fees allowing such costs;" (c) because he did not consider there were any special circumstances or difficulties in the case of the said defendant which made it necessary that his answer should be approved of by senior counsel (though the charges, as between solicitor and client, and under the latter's written authority, might be very fair and reasonable).



2. That he had disallowed the costs of such counsel at the hearing "in pursuance of the general practice, which is that only two counsel, on a motion for a decree, are allowed, unless there are special and exceptional circumstances," which he did not think existed in the said defendant's case; and that the costs of two of the defendants, Parker and Gray, had already been taxed—the former by the late Master Gibson, and the latter by himself (Mr. Teeling), and that in neither of their bills was any claim made or allowed for such counsel's fees.

3. That he had disallowed the costs of such third counsel's briefs for the above-mentioned reasons; and,

4. That the costs of the pleadings in *Hoey v. Boyle* had been disallowed, because they were not taken down in the decree of the 23rd of May, 1871.

Mr. Pilkington, Q.C., for the defendant, Ponsonby:—

June 24.

The Taxing Master was mistaken in supposing the case was heard on motion for a decree, since it was brought to a hearing on replication. I submit the circumstances were exceptional. Mr. Parker's case differed from that of all the other defendants, for he had only lately become a director of the company—viz., in February, 1867; my client having been named one by the original Act of 1846. *Davis v. Dysart* (1), decides that the costs of two counsel to settle an answer may be allowed "by special order of the Court;" they were refused in that case, but the bill had been filed "for the simple purpose of compelling the production by the defendant of certain title deeds."

It was necessary the pleadings in *Hoey v. Boyle* should be briefed to counsel, having regard to the twentieth paragraph of the bill in the present case, and the notices of December 19th and 21st, 1870.

As to a third counsel at the hearing, it was usual, under the Chancery Regulation Act, 1850, for the Court to direct a third counsel to be instructed, if necessary, and I submit your lordship would have done so in this case. [The VICE-CHANCELLOR—Did I hear three counsel?] No; your lordship stated at the beginning of the case that, having regard to the large number of counsel engaged, you would only hear two for each defendant. In *Pearse*

V. C. Court.
1872.

v. *Lindsay* (1) Vice Chancellor Wood refused the costs of a third counsel (thus reversing the Taxing Master's decision), and observed that there was but one case in the books (viz., *Carter v. Barnard*) (2), where such counsel had been allowed as between party and party, and there the junior had taken silk; but on appeal (3) to the full Court the third counsel was allowed. [The VICE-CHANCELLOR—There was but one defendant in that case. If Mr. Ponsonby had been the sole or principal defendant I should have no hesitation in allowing him for three counsel, but what presses on my mind is that he was *in consimili casu* with several other defendants. I have no doubt, however, he was justified in answering separately.] Then, I submit, if he was justified in answering separately, that is the conclusion of the case. See *Begbie v. Fenwick* (4).

Mr. G. Fitzgibbon, for the plaintiff:—

There is no difference between the principles on which the costs of a motion for decree and of a hearing on replication are allowed. The report of *Davis v. Dysart* (5), on appeal, shows that it was not a "simple" case. The fact that a document is not inserted on the readings of the decree shows that it was not wanted in the case. In *Pearse v. Lindsay* (*ubi. sup.*) three counsel were heard, which makes a great difference. It is stated in *Begbie v. Fenwick* (6) that three junior were allowed "on account of the complexity of the case," arising from a contention as to the validity of the defendant's security. In *Horsley v. Cox* (7) three counsel were allowed, because the counsel had taken silk. See Morgan's Ch. Ord., 586 (ed. 1868), citing *Attorney-General v. Monro* (8) and other cases. In the present instance there were eight or nine defendants whose cases differed but little, and they should not all be allowed separate sets of costs.

THE VICE-CHANCELLOR:—

I have considered this very serious case with every anxiety to allow the successful parties, as far as I could, their costs reasonably incurred in the suit, but I cannot allow the costs of three counsel

(1) *Johnson*, 702.

(2) 16 Sim. 157.

(3) *Johnson*, 705; s. c. 1 De G. F. & Jo. 573.

(4) L. R. 6 Ch. App. 869.

(5) 8 De G. M. & G. 33.

(6) L. R. 6 Ch. App. 869.

(7) L. R. 7 Eq. 464.

(8) M'N. & G. 213.

as against the plaintiff. I do not mean to lay it down as a rule that the costs of three counsel should never be allowed on taxation as between party and party; but Mr. Ponsonby's was in the main a defence in common with other parties who have been allowed their costs by me. I agree with Mr. Pilkington that the fact that the Court may not hear a third counsel affords *per se* no conclusive argument against the costs of such counsel being allowed, as there are many cases in which counsel are not heard, and yet their fees are allowed. But I think that where there are a number of defendants, all having, to a considerable extent, a common case, there is not the same reason for allowing additional counsel, as it is not to be supposed that more than two for each defendant or set of defendants will be heard by the Court. I at first thought with Mr. Pilkington that the fact that there was a difference between his client's case and that of the other directors was in his favour, but it seems to me now to be rather an argument against him; for since the difference consisted in his client's having stood in a more favourable position than the main body of the directors, as Mr. Fitzgibbon says it followed, as a matter of course, that if the bill were dismissed as against the others, it should be dismissed also as against Mr. Ponsonby. Of course all the defendants had not precisely the same case, and there were circumstances which justified several of them, including Mr. Ponsonby, in answering separately; but the burden of the defence fell upon the seven directors who joined in their answer. On these grounds, and having regard to the authorities cited on behalf of the plaintiff (though the practice in England in this respect does not completely guide this Court), I do not think I can impose upon the plaintiff the burden of paying a second counsel's fee for approving of the answer, or a third counsel's costs of appearing at the hearing. It was quite right, as between solicitor and client, that these parties should employ any number of counsel they thought proper, but it is not fair that the plaintiff should have to pay for them.

As to the briefs of the pleadings in *Hoey v. Boyle* the Taxing Master is correct in saying, as a general rule, that only the documents entered on the readings of decrees should be taxed; but where documents are put in issue by one party which the opposite party may reasonably expect to be put forward as evidence, he

V. C. Court.
1872.

must be prepared to meet them, and may be justified in having them briefed to his counsel. In such cases it is the province and the duty of the Taxing Master to exercise his discretion and allow the costs of the briefs of such documents if he considers that the party was justified in having them briefed, having regard to their probable materiality and relevancy to the case as pleaded, even though they have not been read at the hearing.

Here, then, a notice was served, and very properly served, on the plaintiff, requiring him to specify what documents, referred to in paragraph 20 of his bill, he intended to rely upon; and to that he replied by a notice, stating he would rely on the bill and answer in *Hoey v. Boyd*. His omitting to put them in evidence at the hearing cannot be allowed to deprive the defendant of his costs of having them briefed. I shall, therefore, direct Master Teeling to review his taxation by allowing this item. Since this motion has partly succeeded and partly failed, I shall order each party to bear his own costs of it.

Solicitors for the plaintiff: *Messrs. William Roche & Son.*

Solicitor for the defendant, Ponsonby: *Mr. A. M'Dermott.*

Probate,
1872.

RYAN v. DOLAN.

(By permission, from I. R. 7 Eq. 92.)

Nov. 25.
Dec. 9, 16.

Costs—Taxation between Solicitor and Client—Schedule of Fees—Discretion of the Officer.

1. On taxation of costs, as between solicitor and client, the schedule of fees, though a guide to the taxing officer, does not bind him in the exercise of his discretion, which ought to be exercised upon the principle of liability to the solicitor and justice to the opposite party.

2. The remuneration for loss of time which medical witnesses attending during the examination of the other witnesses fairly claim may be paid to them and charged to the opposite party.

MOTION, that the Registrar be directed to review his taxation of the defendant's bill of costs. As the material facts, and the manner in which the case came before the Court sufficiently appear from the judgment, it is only necessary to state that the trial

lasted for three days; and for their attendance during those days the medical witnesses claimed £15 15s., and were paid at the defendant's request £5 5s. for each of the first two days, and £3 3s. for the last.

Probate.
1872.

The judge, on the motion coming on, directed the case to stand over for a Report from each of the Registrars, which having been made:—

Nov. 25.

Mr. Monroe, for the defendant, contended that the remuneration allowed by the Registrar was much too small, under the circumstances, and that he could and should have exercised his discretion, notwithstanding that a sum was specified in the schedule of fees.

Dec. 9.

Mr. Carton, for the plaintiff, was willing to leave the matter to the decision of the Court.

THE JUDGE—This was a motion to review the taxation of costs. Such motions do not frequently come before the Court, and are not entertained unless some principle is involved in the case, and I thought it desirable to ask the Registrars, by whom the duty of taxation is discharged, for a report. I have received reports accordingly, and, although the Registrars do not concur in their opinions, I have received assistance towards the decision of the question. The case was tried before the Court, and after some days terminated, by a compromise, in a verdict and decree for probate of a will which the defendant had contested mainly upon the alleged incapacity of the testator. One term of the compromise was payment, out of the assets, of the defendant's costs, to be taxed as between solicitor and client, I approved of the compromise, and made a decree in conformity with its provisions. In drawing up the decree the officer appears to have inserted the words “properly and necessarily incurred”—words of course in the ordinary adjudication of party and party costs, but rather incongruous in connection with the taxation between solicitor and client. However, the words, reasonably interpreted, do not seem to me inconsistent, and, at all events, should be taken as subordinate to, and controlled by, the direction to tax between solicitor and client, according to the meaning of the Court and the parties.

Dec. 16.

Probate.
1872.

Upon the taxation of the costs under this decree, it appeared that fees had been paid to medical witnesses considerably in excess of those specified in the schedule of fees in contentious business. It seems to have been considered proper and necessary in the case that these witnesses should attend during the examination of other witnesses, in order to afford professional information for cross-examination, or to enable them to give critical testimony as skilled witnesses. The officer, as a matter of principle, refused to allow any fees exceeding those authorised by the schedule, considering, as he informed the Court in his report, that he had no discretion in the matter. Now, the only question in the case is, whether the schedule of fees absolutely binds the officer, and excludes the exercise of discretion in the taxation of costs as between solicitor and client, as it certainly does in the taxation between party and party. In Daniel's Chancery Practice (5th Ed., 1871, p. 1298), "No definite rules can be laid down with respect to the difference between the costs allowed upon one principle of taxation and those allowed upon the other. In general, however, in taxations, as between party and party, only those charges will be allowed which are strictly necessary for the purposes of the prosecution of the litigation, or are contained in the tables of fees annexed to the General Orders and regulations of the Court; while in taxations as between solicitor and client, the party will be allowed as many of the charges, which he would have been compelled to pay to his own solicitor as being costs of suit, as fair justice to the other party will permit." That is to say, in the case of party and party taxation, the rules are, strict necessity and the schedule of fees; in the case of solicitor and client, the rules are, liability to the solicitor and fair justice to the opposite party. In my opinion, the schedule may guide but does not control the discretion of the officer, when taxing costs as between solicitor and client. In Gray on Costs, p. 553, the schedule for fees of the Courts of Common Law in England is printed. [The learned Judge read the heading to the schedule of fees.] This shows clearly that, in cases (outside the express limit) of taxation between solicitor and client, the schedule does not bind the discretion, *i.e.*, if fair justice and liability to the solicitor require that the specified fees should be accorded. It is never fair to charge an opponent with

extravagant expenditure, although the client may be liable to his solicitor, and here the officer is to exercise his discretion. Mr. Daniel proceeds—"When costs are directed to be taxed as between solicitor and client, it does not necessarily mean that all costs which the solicitor is entitled to against his client are to be allowed, but the allowance will vary according to the circumstances of the case, regard being had to the position of the parties, and the fund out of which the costs are to be paid, and a distinction is made—first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund in which the party has only a limited interest; and, thirdly, where such costs are payable out of a fund belonging exclusively to the party himself." Witnesses may be compelled, upon payment of the fee mentioned in the schedule, to attend for personal examination, but they cannot, and will not, be compelled to remain in Court day after day watching the case and the testimony of other witnesses; and if the reasonable exigencies of the case render such attendance proper, I think the medical witnesses may fairly claim larger remuneration for their loss of time, and what they may fairly claim may fairly be paid, and with fair justice be charged against an opponent when the costs are directed to be taxed as between solicitor and client. I do not forget that, even as between solicitor and client, taxation varies according to the fact whether the costs are to be paid by the client, or out of a fund which is not the client's; but the chief differences are in the care with which it is the duty of the officer to consider the fair justice of the charges in the latter case, a matter of comparative unimportance in the former, where an excessive and an extravagant outlay has been directed or insisted on by the client himself, and in the strict limit of the costs to the costs in the suit—the proceeding itself—as distinguished from all preliminary or collateral costs: Gray on Costs, page 492. *The Davering College Case* (1) illustrates this. There more than two counsel were allowed against the fund, because taxed as between solicitor and client; more than three refused, because such extravagance under the circumstances would not have been fair justice. And in *Foster v. Davies* (2), where the costs of a suit were ordered to be taxed as between solicitor and

(1) 3 Myl. & Cr. 474.

(2) 32 Beav. 624.

Probate.
1872.

client and paid out of a trust fund the Master of the Rolls says (p. 627):—"It is always to be borne in mind that this is not a question as to costs between party and party, in which case these costs would not be allowed; but whether the term 'costs of the suit as between solicitor and client' does not mean such costs of the suit as the client would have to pay his solicitor. I think that these are costs which the client would have to pay his solicitor under the technical term 'costs of the suit,' and that as such they come within the order." I think the officer ought to have exercised a discretion, and, inasmuch as medical witnesses, though obliged to attend for personal examination, were not obliged to attend during the examination of the other witnesses, I think it was reasonably proper, and legally necessary, to pay them extra fees; and that the fees actually paid and authorised by the client ought to be allowed, unless (a matter which I decline to decide) the fees were extravagant and excessive. Let the case be referred back, the applicant to have the costs of the motion with his costs in the cause.

Solicitor for the plaintiff: *Mr. John Scallan.*

Solicitors for the defendant: *Messrs. Casey & Clay.*

Com. Pleas.
1873.
May 3, 5, 6, 8.

IN THE MATTER OF THE COUNTY GALWAY ELECTION PETITION: TRENCH, PETITIONER; NOLAN, RESPONDENT.

(*By permission, from I. R. 7 C. L. 445; s.c. 7 Ir. L. T. R. 188.*)

(Before KEOGH, MORRIS, and LAWSON, JJ.)

Costs—Taxation—"Parliamentary Elections Act, 1868" (31 & 32 Vic. c. 125).

The petitioner having been awarded the costs of the petition—on a motion that the Master should review his taxation:—*Held*, 1. That the petitioner was entitled to be recouped the sums actually paid by him for copies of the shorthand-writer's notes; 2. That he was entitled to the expenses of witnesses *bonâ fide* summoned, though they had not been produced; 3. That the Registrar's certificate was not necessary to entitle him to the expenses of witnesses; 4. That he was entitled to the costs of an illustrated map of the county; 5. That he was entitled to a retainer of ten guineas paid to each of two senior counsel; 6. That he was entitled

to the fee paid to junior counsel on the hearing of a case reserved ; 7. That he was entitled to the costs of proceedings to draw money out of Court ; 8. That the Master—in exercising his discretion as to the number of counsel, the amount of their fees, the number of consultations, the amount of consultation fees and refreshers, and the expenses of subpoenas to witnesses, telegrams and messages—ought to have regard to the difficulty, magnitude, and importance of the particular case.

Com. Pleas.
1873.

MOTION, on behalf of the petitioner, for a direction to the Master to review his taxation of certain specified items in the petitioner's bill of costs, which had been ordered to be paid by the respondent.

As those items are disposed of *seriatim* in the judgments, it is unnecessary to set them out here.

There was also a motion, in the nature of a cross motion, by the respondent, for a like purpose, which is disposed of by the judgments in a similar manner ; and as the respondent failed to reverse any decision of the Master, his motion was refused with costs.

Armstrong, Serjt., James Murphy, Q.C., and Bewley, for the petitioner.

As to the costs of the shorthand-writer's notes, they referred to *Clark v. Malpas* (1), and *Malins v. Price* (2).

Butt, Q.C., Exham, Q.C., and P. Martin, for the respondent.

The Court reserved judgment.

KEOGH, J. :—

The application before us is to review the taxation of the Master—the taxation of the costs of the petitioner which were awarded to him as against the respondent. The principle of taxation is expounded in the case of *Hill v. Peel* (3), where Chief Justice Bovill quotes from Morgan & Davey's work upon Costs in Chancery, p. 1, as follows :—

May 8.

“It is impossible to lay down with exactness any rule upon the subject ; but generally it would seem that all such costs would be allowed as a solicitor would ordinarily incur in the conduct of his client's business, excluding those extraordinary costs which may have been occasioned either by the default of the client, as, by his incurring a contempt, or by his express instructions, as, to employ

(1) 31 Beav. 554.

(2) 1 Phill. 590.

(3) L. R. 5 C. P. 178.

Com. Pleas.
1873.

an unusual number of counsel.” Afterwards, he goes on to say (1) —“It therefore appears to us that the parties entitled to their costs under the orders were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution and over-anxiety.” We think, also, that all such extraordinary costs, without distinct and special instructions from his client, ought not to be allowed to the attorney; and that that paragraph took a comprehensive and common-sense view of the whole case, and the principles on which the costs of election petitions ought to be taxed.

With that view of the case before us, we approach the consideration of the objections to the taxation of this very heavy and important bill of costs. For the sake of clearness, I will take the items in order. First, as to the retainers. The petitioner, before the petition was filed, retained two senior counsel, giving each of them ten guineas. We cannot see on what principle the Master took five guineas off one retaining fee and disallowed the other; and we think that the amount of these fees ought to be allowed, and that, in that respect, the taxation should be sent back for review.

The next item is the fee for settling the petition in consultation, which has been disallowed. It was said that there was nothing in the petition that it was merely formal, and that junior counsel might have settled it. This was one of the most peculiar and extraordinary cases that had ever been dealt with under this jurisdiction. I think I have some knowledge of it. The form of the petition and the charges in it were peculiar; the case of the petitioner was grounded on peculiar facts that required to be very specially stated, and my recollection is, that on the trial a great stress was laid on the terms of the petition, and a very able argument was sustained that the terms of the petition did not warrant the admission of a particular class of evidence of undue influence, upon which the petitioner relied; and a similar argument, on similar grounds, was brought forward before me as not justifying me in seating the petitioner when the seat was declared vacant. We therefore think that, from the peculiar character of the case, its

(1) L. R. 5 C. P. 180.

magnitude, the important interests involved, and the difficult questions to be decided, that this item should be allowed, and that the consultation fee, with its concomitant items, should be sent back for review.

Com. Pleas.
1873.

I will take together the items which refer to the respondent's motion for a bill of particulars. That motion was heard by me several days before the time fixed for the hearing of the petition, and sufficient grounds were laid to satisfy me that if the petitioner were compelled to disclose the names of his witnesses—and that was the object of the motion—there would have been an end of the case. It was a vital motion, and one of great importance in the case, and I am satisfied everything turned upon it. The matters that subsequently came under my own observation at the trial confirmed me in my opinion as to the propriety of the petitioner's resisting that motion. The Master has disallowed these costs, but we have taken a different view of the matter, and direct him to review his taxation.

Then comes the item which deals with the fee of twenty guineas paid to the petitioner's leading counsel to advise proofs, which the Master has reduced to fourteen guineas. Upon what principle the fee was so reduced I am at a loss to see. I am not going into the question whether it was considered a large fee or a small one, but if there ever was a case the magnitude and importance of which justified a liberal payment to counsel this was one. This is not a mere question of detail; it is one of grave and great importance not only to the Bar, but to the public. I consider it is of the last importance to the public that when a solicitor, acting *bonâ fide* for the benefit of his client, considers that he ought to give a proper remuneration to counsel, his judgment should not be hastily set aside. We are, therefore, of opinion that the fee in question was proper in amount and in principle, and that the taxation of that item should be sent back for review.

The next item refers to the costs of an illustrated map, marking out the localities where each remarkable scene occurred at this most remarkable election. At the trial the map was most useful and necessary, and commented upon. To understand at all the *res gestæ* it was absolutely necessary. In a large county, which is 100 miles in extent both ways, it was absolutely necessary; but we

Com. Pleas.
1873.

all of us know, who have been on committees in the House of Commons, that the very first thing that will strike you on entering the committee-room is an enormous map of the locality from which the case comes, for the use of the committee and witnesses. We think it was justifiable in this case to follow the practice of the House of Commons, and we cannot see why the costs of it should not be allowed to the petitioner.

We now come to the item which relates to the cost of subpoenas to witnesses, which is of considerable amount. There is no ground for doubting the reasons given for putting the name of one witness only in each subpoena. If the names of four witnesses were given in a subpoena it would at once have become known who were the other three, and we can speculate upon what was likely to take place. However, the Master has informed the Court that by consent it was arranged that his decision should be accepted by both parties, and the Master, in the exercise of his discretion, has allowed one subpoena for every two witnesses. We think that a fair exercise of his discretion, and we decline to interfere with it.

The next item had reference to fees to counsel. I have already made certain remarks as regards the twenty guineas fee to the petitioner's leading counsel, and I wish to apply everything I have said to these other items. There were 150 guineas paid to each of the leading counsel, and 100 has been allowed. As regards this particular item, we are not disposed to quarrel with the decision of Bovill, C.J., in the *Tamworth* and *Southampton* cases (1). When we come to this case, I ask is it an ordinary one? I will not pause to answer the question as to whether it is an ordinary or a very extraordinary case; but we asked the Master as to whether he had exercised his discretion on the magnitude of the case, or whether he had cut down the fee to 100 guineas on the decision of Chief Justice Bovill; and the Master told us that he allowed the 100 guineas, as it was the usual fee to counsel and adopted as the uniform rule, and he did not wish to travel out of it in this particular case. Therefore he did not consider this case on its special merits. It is quite sufficient for us to say, in the language of the judgment to which I have referred, that we consider the Master ought to have exercised his discretion as regards these fees, and

(1) L. R. 5, C. P. 172.

looked to the extraordinary length of this case, its magnitude, and the extraordinary circumstances by which it was surrounded. It is a case to which no uniform rule could be applied, being of unprecedented importance, and therefore that item must be sent back to be reviewed.

Com. Pleas.
1873.

The next items deal with the fees to counsel—daily refreshers and consultation fees. The refreshers were twenty guineas, and consultations five guineas. The Master has reduced the refreshers to fifteen guineas, and the consultation fees from five guineas to two. Now, in ordinary cases in England, twenty-five guineas was the sum allowed. That was the fee allowed in the *Tamworth* and *Southampton* cases (1). In this case twenty guineas had been paid as refreshers daily, and the Master has reduced them to fifteen guineas. Upon what principle such a reduction is made I cannot see. The consultation fee is reduced from five to two guineas, and the refresher is reduced by five guineas. We do not see why that should be done. We think it was done on some loose rule, and without reference to the extraordinary nature of the case. We therefore direct the Master to review his taxation with respect to the reduction, and with regard to the attendances which he has struck off, and which were consequent upon those consultations; but we refuse that part of the motion which seeks to have more consultations allowed than the Master, in the exercise of his discretion, thought necessary.

Then comes the item which relates to the sum paid to the shorthand writer. This is a most important item, not only as regards this case, but the general management of all such cases. In all cases there is no greater cause of delay than the ordinary mode of taking down the evidence. We know how necessary it is that both question and answer should be taken down. The legislature has wisely provided an elaborate machinery for the taking down of the evidence at the trial of all these election petitions. It is not new, for it has been used in the House of Commons at the trial of all election petitions ever since shorthand writing was known. During the whole course of this protracted trial there was nothing so perpetually referred to as these notes. They were in volumes. I think in print they would equal in magnitude

(1) L. R. 5 C. P. 172.

Com. Pleas.
1873:

the "Encyclopædia Britannica"; and are we to come to the conclusion that after all the trouble that has been taken to provide this admirable machinery, the parties are to be precluded from availing themselves of it, unless they do so at their own special cost? During the trial the leading counsel for the respondent frequently lamented that he had not the advantage of a copy of the notes; and occasionally I lent him my own copy, and the petitioner's counsel lent him their copies. We are clearly of opinion that whatever was paid for the shorthand writer's notes should be specially allowed, and that is the amount to be paid to the petitioner. He is to be allowed the sum of money he actually paid for those notes, and that only; and we are of opinion that the Master should review his taxation in that respect. It was said that as there was a third counsel, that gentleman should have taken notes of the evidence. But, in the first place, no counsel could have kept pace with the trial—much less have copied out his notes against next morning. I quite agree with my brother, LAWSON, that that would not have been the proper business of counsel in a case of this kind; when a counsel is retained to act as counsel it is not his business to turn himself into a note-taker in the case. His services are retained to assist in the conduct and management of the case as counsel, and not as note-taker; and it is no answer to say that, because a third counsel is employed, he should have taken notes of the evidence.

Then comes a very important item—the expenses of the witnesses. In considering this matter we must look to the progress of the trial. There were vast batches of witnesses summoned, and some of them were told that their services would not be required, and that they might go away. There were large numbers of clergymen and vast numbers of farmers and labourers summoned who were not examined, and I suppose when going away there were none of them reluctant to take as much as they could get. When settling the witnesses' expenses the Registrar of the Court allowed so much for clergymen, farmers, labourers, and others, and, for the purposes of taxation, he went through all the witnesses produced on this trial, and gave them certificates; but he declined to give certificates to witnesses who were not examined. There was a double contention about this. First, it was said that, as

regards all the witnesses that were certified, those only who were examined should be allowed; and then, that all the witnesses not certified for should not be allowed at all. There was no disputing that the petitioner's claim should be allowed for the witnesses examined at the trial, and we are of opinion that the Master should allow, as in ordinary cases, for all witnesses *bonâ fide* summoned on the trial, whether certified for or not. This is the practice adopted in England upon these election petitions, and the expenses of such witnesses were allowed by Master Gordon, who holds in England a relative position to that of the Master of this Court. We have then come to the decision that the party is not bound to examine every witness he thinks fit to summon, and that he is entitled to the expenses of every witness whom he *bonâ fide* brings to the place of trial to support his case. This trial was a series of records—there was something fresh occurring every day, and it would be very hard if the parties summoning the witnesses, in the exercise of a wise discretion, should not be allowed their expenses in case he did not desire to produce them. We are of opinion that the Master should exercise his discretion on this subject and review the taxation of this item, having regard to our ruling. A point was urged upon this item, and we cannot leave it without expressing our opinion upon it. We do not entertain the idea that because a trial is finished, the Registrar has no further authority to certify for expenses, or that the case passes out of the power of the Judge the moment his year of office *in rotâ* expires. That objection is perfectly untenable. We had the attendance of the Registrar in Court during this very argument, so that if his certificate was necessary it could be had, but we did not think it necessary, and therefore we send this item back to the Master to deal with it according to our ruling.

Then comes the item in which the attorney for the petitioner claims for three witnesses who were omitted from the bill, and he asks for an order that their expenses shall be allowed, and we give him that order. I shall not dwell on that. The rules of the Court are not made for the purpose of taxing *bonâ fide* expenses of necessary witnesses, and we direct the Master to allow the witnesses' expenses, if he considers them proper, *bonâ fide*, and necessary witnesses.

Com. Pleas.
1873.

As to the item which deals with telegrams and messages, it was a controverted point whether the Master allowed some of the telegrams and messages, or whether he disallowed them *in toto*. That is a dispute as to a matter of fact. If the Master disallowed them *in toto* we are of opinion that he should have dealt with the merits of each; if he exercised his discretion upon them, then we say nothing more on the subject, if he has allowed what he considered necessary; but if he has disallowed them *in toto* as not at all chargeable, then we say he ought to consider each of them on its merits.

The next item refers to the cost of furnishing the expense-agent's account. The respondent contended that the petitioner should within two months from the election put on record the expenses of his agent, and that if he had done so he would not have required to have asked him for it. In this particular case the respondent did in Court ask the petitioner to supply him with the expense-agent's account, and upon the application to me it was immediately furnished to the respondent, and there can be no reasonable principle why the petitioner should not have the costs of so furnishing it.

The next item deals again with the fees to counsel on the final hearing. This was the last proceeding of the whole case. The question before the Court was whether the petitioner was entitled to be duly elected upon the unseating of the respondent by me. That I put into my certificate, and it was reserved for the full Court (1). It was a most important motion as to whether the petitioner, after all, was to be declared duly elected or not. This was the case reserved for the opinion of this Court, and there was great learning and great research required upon it. Fifteen guineas were allowed to counsel on that motion, which have been reduced to ten. We do not think these fees at all unreasonable. The fee to the junior counsel has been disallowed, but we think that on such a motion to deprive the senior counsel of the assistance of the junior would have been an unprecedented act. Therefore we think the fee due to junior counsel should be allowed, and in that respect the taxation must be sent back for review.

We have next the item which refers to the costs of the proceed-

(1) Reported Ir. R. 6 C. L. 464.

ings taken by the petitioner to draw out the money which was lodged by him. In the first place, an application was made before Mr. Justice O'Brien, but he would not hear it. Then it was renewed before Mr. Justice Barry, who said it ought to be made before a Common Pleas Judge; next it comes before the Chief Justice of this Court, who made the order sought. We cannot understand upon what principle the petitioner should not be allowed the costs of those proceedings, and this item we also send back for review.

So far we have dealt with the petitioner's application to review the taxation of these costs. There are some small items to which it is unnecessary for me to particularly refer, but the Master in dealing with them will exercise his discretion and judgment, upon the same principle as those which have been specifically referred to.

We have now to consider the application of the respondent, who is dissatisfied with the taxation in the sums allowed and disallowed on certain particular items. I shall take the respondent's notice, and refer to it in the same manner as I have already referred to the petitioner's.

Paragraph 1 asks that we should disallow the costs of and the fees paid on such of the daily consultations of counsel allowed to the petitioner as were not shown to have been properly held, by reason of any difficult points or phases having arisen, or unexpected complications of proof having occurred during the progress of the case. Of all the applications I ever heard of, that beats every one of them. It amounts to this—that the Master was to inquire into all the complicated questions that arose—in fact, that he was not only to re-try the Galway Election Petition, but also all the matters that occurred at the consultations. That part of the application must be refused.

Paragraph 2 seeks to limit the refreshing fees of counsel to a maximum of ten guineas for senior, and five guineas for junior counsel, and to allow only two counsel on the trial. That we have already disposed of by our rulings, and we accordingly refuse it.

In paragraph 3 the respondent seeks to have disallowed the expenses paid to, or alleged to have been paid to, any person not duly certified by the prescribed officer, within the meaning of the statute, to have appeared to have been examined as a witness on

Com. Pleas.
1873.

the hearing of the petition, and that the Court shall treat as null and void any document purporting to be such a certificate which shall bear date after the period when the learned judge who tried the petition ceased to be a judge on the *rota* for the trial of election petitions in Ireland for the year 1872. That I have already dealt with—we refuse it.

Paragraph 4 prays that in cases where a regular certificate for a witness's expenses, within the meaning of the statute, shall be produced, the Master shall, nevertheless, be at liberty to tax and ascertain the proportion of the expenses included in such certificate to be reasonably allowed against the respondent as part of the costs of the petition, and to allow only so much thereof as should be proved to have been paid to such witness. That we also refuse.

Paragraph 5 prays that the Master shall be directed, in ascertaining the sum properly chargeable for subpoenas, to have regard to the localities in which the persons summoned resided, with a view of grouping in one subpoena as many witnesses as in his opinion could be conveniently and properly included therein in order to save the expense of unnecessarily multiplying subpoenas. We do not interfere, in any way, with the decision of the Master upon this point, upon the grounds that I have already stated, and we, therefore, decide that the sum arrived at shall not be disturbed.

Paragraph 6 prays that the Master shall disallow all costs incurred, or alleged to have been incurred, in relation to treating or other charges contained in the petition which failed in proof or were withdrawn by the petitioner, and that the Court or the learned Judge who tried the petition may, if necessary, amend the order made by him after the trial of the petition by declaring the petitioner not to be entitled to said costs. It is quite sufficient for me to say, as was said already in the case, that the order made in Galway we shall not disturb, and that we see no earthly reason to distinguish one part of the costs of the case from another.

Paragraph 7 prays that the Master shall disallow all fees paid to, and all such items in the bill of costs, as were incurred by reason of the retainer and employment of a third counsel in the case. That has already been disposed of.

Paragraph 8 prays that the Master shall disallow, either wholly, or in part, the items mentioned in the schedule, for the reasons set forth in it, or for such other orders as the Court shall be pleased to make. Upon referring to the schedule, I find some of the items relate to the fees to Serjeant Armstrong, which we have already disposed of, and some small items relating to that first fee. This we also refuse.

There is another item in the schedule which has given rise to some discussion, and that is the charge incurred in connection with the service of the copy of the petition upon the respondent. It is said that the respondent wishes to have those costs disallowed which were incurred in substituting service of the copy of the petition upon him, more as a matter of feeling than from any pecuniary consideration. We do not consider that there is any imputation upon him as regards the service of the petition. We do not consider that there is any imputation upon Captain Nolan—not the slightest—that he did not delay in town for the purpose of giving the petitioner's agent facilities for serving him with the process. We do not consider he was bound to do anything of the kind, and I do not think it is any reproach upon Captain Nolan that he did not give those parties any facility whatsoever for serving him. We think he was perfectly justified in acting as he did; but we think his having done so put the opposite party on the *qui vive*, and that they were perfectly justified in taking the steps directed by their leading counsel that were necessary under the circumstances to secure an effectual service. Therefore we think these costs should not be disallowed, as asked by the respondent. That, I think, disposes of the whole of the case, and the only matter that remains is as regards the costs. There are some items in detail, but as there is no principle involved in them, we will leave them to the discretion of the Master. As regards costs, the decision of the Court being against the Master's decision, we could give no costs. They are not asked for by the petitioner, and, even if they were, we could not give them; but, as regards the motion of the respondent, we refuse that motion, and with costs, having failed *in omnibus*.

Com. Pleas.
1873.

MORRIS, J. :—

I concur in the judgment of the Court as pronounced by my brother, ΚΕΟΓΗ, and I desire to say two or three words upon the case. It is wholly unnecessary to go through this long bill in detail, but I just wish to express my opinion shortly on what I think are the leading points in this case. The first is as regards the retaining fees to counsel. It appears that these retainers were given as being the only retainers applicable to the case, if there was to be a retainer at all. I could quite understand there being a discussion that there should be no retainer at all; but, allowing that there was to be a retainer, then such a retainer should be allowed as would effect the object that was desired. I remember, a very short time before I left the bar, a committee of the bar was nominated for the purpose of settling those fees which affected the joint interests of the bar and the public. The report made by the bar committee in 1864 was signed by a numerous body—twenty in number; and among them I find the names of Ex-Lord Chancellor Brewster, Serjeant Sherlock, the late Master of the Rolls, the Judge of the Probate Court, the Vice-Chancellor, the Solicitor-General, the Judge of the Bankruptcy Court, Baron Dowse, and other gentlemen of equal eminence at the profession. By these rules it is perfectly plain that the two retainers given to counsel in this case were the only mode of retaining counsel, if they were to be retained at all. Therefore, I cannot understand why there should be any contention on this subject if there is to be any retainer at all. The second large item which I think it necessary to refer to is the item for supplying the petitioner with a copy of the shorthand writer's notes. We consider that the petitioner should be allowed the amount paid to the shorthand writer. Anyone of any experience of the trial of petitions before a Committee of the House of Commons will remember that the very first thing provided for is the expense of the shorthand writer—in fact, no English counsel would go before a Committee if he were not furnished with a copy of the shorthand writer's notes. The shorthand writer is an appointed officer of the House of Commons, and his report of the evidence in all cases is taken to be conclusive on all parties. Therefore, *a priori*, it would be impossible to object to the payment for the shorthand writer's

notes. I have here a return from Master Gordon, who holds an analogous office to that held by Master Burke in this Court, and by it it appears that the transcript of the shorthand writer's notes is allowed for. This is one of the most reasonable charges that could be made—namely, the cash paid out of pocket, and, therefore, we think it ought to be allowed; but we have, besides, the practice in England, where it is laid down as an absolute necessity that the amount paid should be allowed. The third item to which I wish to refer is, with regard to the expenses of witnesses who were not certified for by the Registrar of the Court. Now, that raises an important question, not alone affecting this case, but all cases. We are of opinion that the Master should allow the expenses of the witnesses in this case, just as he would allow them in an action upon a bill of exchange—that he should allow the expenses of necessary and *bonâ fide* witnesses, so that there should be no trafficking in them. Now, in this case, it was strenuously urged that those expenses should not be allowed which the Registrar had not certified at the time of the trial of the petition; and then, doubling back upon that again, it was said that the Registrar had not certified for them rightly. Again, it was contended that the expenses of witnesses could only be certified for by the Registrar, and that he could not certify for them after the period when the Judge who tried the case ceased to be a Judge on the *rota* for the trial of election petitions. Now, that plainly seems to me to be a special demurrer. The 34th section of the Act of Parliament enables the Registrar, or prescribed officer, to give certificates for the expenses of the witnesses, which are to be deemed part of the costs of the petition. That is done for the benefit of the witness himself. The amount lodged by the petitioner is not alone liable for the costs of the respondent, but also for the expenses of the witnesses, and is a security that they shall be defrayed. What costs and expenses are more pertinent to the carrying on of the prosecution of an election petition than the expenses of the witnesses? We are of opinion that they should be allowed, and we leave it in the discretion of the Master, with which we are not interfering, to say upon inquiry whether these were proper and necessary witnesses to have examined, whether they had been paid the amount that was charged for them, and that it was a

Com. Pleas.
1873.

reasonable amount. Allow me, also, to add, that we have the report of the Master in England, Master Gordon, and that was what was done in England—it is the common sense view of the question—and why should it not be done here? This was a most extraordinary demurrer which has been argued by the respondent's counsel, but the argument falls to the ground. Upon the petitioner's application to review the taxation, I thought it right to say these two or three words with reference to these large items. The motion of the petitioner is granted in respect of those items which we have stated, but we refuse the costs of the subpoena in every case in which it was separately used, in accordance with the decision of the Master, and the allowance in that respect is not interfered with. I shall now turn to the respondent's application, which in reality is decided by our judgment upon the items already mentioned. We are asked to disallow the expenses of witnesses who were to be examined in support of the charges of treating which were abandoned. This was dealt with by anticipation by the learned counsel who opened the motion, who said there was a good deal in it, although he could not see it. We are of the same opinion. The Judge having, under the 41st section of this Act, declared that the petition should be allowed with costs, and having made no division of the costs at the time of making the order—and that would have been the proper time to have raised the question of the division of costs, if the able counsel who were then in the case had thought right to do so; and I am sure they would have done so had they thought there was anything in it—we are now asked, a year and a half afterwards, to vary the original order. We are asked to go into an inquiry and re-try the Galway Election Petition. This is one of the most unheard-of applications that ever was brought into a Court, and we deal with it as counsel, by anticipation, considered it likely it would be dealt with—by refusing it. The only other item to which I wish to refer is the five or six pounds charged for substituting the service of a copy of the petition upon the respondent. I concur entirely with what has been said by my brother, Keogh. In our opinion, there is no allegation here that the respondent was avoiding service or keeping out of the way. It is very probable that none of us would give very great facilities for parties to serve a process upon us. The respon-

dent was seen in Dublin on a Sunday, and was served on that day. In my opinion that service was bad service. Serjeant Armstrong was of the same opinion, and directed that he should be re-served on Monday. The respondent was applied to, but he replied that he would not give any undertaking not to go away—that it was highly probable he would remain, but that he would give no undertaking not to leave town; and he was, on his own showing, going rapidly to England. Consequently, the petitioner's agent had the respondent's expense agent and his election agent served—modes of service which the Court recognises as good. The cost of doing so—a sum of four or five pounds—was disputed upon some hypercritical notion that it involved a reflection on the respondent. There is no reflection upon him, and, therefore, as that sentimental ground for removing it off the bill of costs does not exist, we will allow it to stand. Upon these points, therefore, the motion altogether failed. On neither motion were there costs asked for, nor indeed could any be given for applying successfully against the decision of the Master. Therefore, the respondent and the petitioner do not ask for them; but it seems to be forgotten that if you do not succeed in reversing the Master's decision, you pay costs. These costs are asked for at the bar when the case has concluded. The respondent's application having been rejected *in omnibus*, it follows the ordinary practice of being refused with costs.

Com. Pleas.
1873.

LAWSON, J.:—

I desire to say a few words as to the principle on which my decision rests. We are called upon to review the taxation of the Master. The taxation of costs in such cases as this is under the 41st section of the Parliamentary Elections Act. This section declares that the costs are to be taxed in the same manner as between attorney and client in a suit in the High Court of Chancery. I entirely adopt the rule laid down by Chief Justice Bovill, that the party succeeding is "entitled to all costs that were reasonably incurred in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution or over-anxiety as to any particular case," &c.

Com. Pleas.
1878.

Now, the first thing we have to consider is, what is the nature of the case with which we are dealing. The Master has told us that he dealt with the case more upon a general rule than having regard or giving consideration to this particular case—the nature of the case, the time it occupied, and the distance from Dublin at which the trial took place. All these matters are proper to be taken into consideration in order to arrive at a conclusion upon the question whether the costs claimed were reasonably incurred in matters of this nature, for, if they are unreasonable, then they ought not to be allowed. Let us refer for a moment to this document that supplies me with a number of the witnesses examined in this case. I find there were 236 witnesses examined for the petitioner, and 100 for the respondent; and then the petitioner went into a rebutting case and examined 12 more, so that in this case 348 witnesses were examined. The case occupied the whole of Easter Term, the After-Sittings, the Vacation, and part of Trinity Term, during the whole of which the counsel engaged in this case were necessarily absent from Dublin. Now, applying the principle laid down by Chief Justice Bovill, we ask are these costs such as an attorney would be justified in incurring, having regard to the nature of the case? The first duty he had to discharge was to retain competent counsel. Therefore, I think those fees ought to be allowed. The Master appears to have acted upon a general rule, and not to have taken into consideration the magnitude of the case, the time occupied, and the number of witnesses examined. We have come to the conclusion to allow those fees which he has struck off, and direct that he should review his taxation in that respect. With respect to the items for the shorthand writer's notes, I think it would be an extraordinary thing if we were to hold that, when the legislature has taken the trouble of providing the machinery for supplying an authentic record of the evidence given at the trial, the party is not to have the advantage of it except at his own expense. We have, therefore, come to the conclusion that the amount actually paid out of pocket for the shorthand writer's notes should be recouped to the petitioner by the respondent, who has been decreed to pay the costs of this case. The next item is with regard to the employment of a third counsel. I think this is a case which, from its

importance and magnitude, required the aid of a third counsel, and I do not think it was his duty to devote himself to taking down the evidence of those 348 witnesses. Therefore I entirely concur with the other members of the Court, that the petitioner's attorney should be repaid the amount actually paid for copies of the shorthand writer's notes, and not that he should be merely allowed the costs of a "dagger" brief. With regard to the expenses of the witnesses, in my opinion, upon the true construction of the Act of Parliament, the provision that the Registrar shall give a certificate is one introduced for the benefit of the witness; but it is not a condition precedent to the Master's allowing the expenses of the witnesses that they should have the certificate of the Registrar.

Com. Pleas.
1873.

If they were properly subpœnaed and even not examined; if they were proper and necessary witnesses; if the Master thinks they were properly and prudently brought here, their expenses must be taxed in favour of the successful and against the unsuccessful party. We are all of opinion that there has been an error in holding that the certificate of the Registrar was necessary for the taxation of a witness's expenses. Now, it has been contended that, because the Judge's year of office has expired, he has no longer power to discharge any duties connected with the case. That, in my opinion, is neither common law nor common sense; but we hold, following the English practice, that the certificate of the Registrar is unnecessary, in order that the expenses of a witness shall be allowed, and we therefore send back the taxation to the Master, with the directions to allow all proper and necessary witnesses, whether examined or not, if the Master thinks they were proper and necessary witnesses to summon.

The Petitioner's motion allowed, without costs.

The Respondent's motion refused with costs.

Attorneys for the petitioner—*Cronhelm, Son, and Tobias.*

Attorneys for the respondent—*M. Green and Co.*

V. C. Court,
1873.

MURPHY v. NOLAN.

June 9, 26, 30.

(By permission, from I. R. 7 Eq. 498.)

Taxation of Costs between party and party—Documents appearing as readings on the decree—Briefs for counsel—Measurement and valuation of improvements to lands—Practice.

1. The entry upon the decree of documents as read at the hearing does not, upon taxation of costs between party and party, exclude the Taxing Master's discretion as to disallowing the charges for briefing them to Counsel.

2. Upon taxation of costs between party and party, the sums paid to witnesses for inspecting, measuring, and valuing improvements upon lands, will not be allowed in addition to the charges for the affidavits made by those witnesses.

MOTION, that the Taxing Master should review his taxation of the plaintiff's costs. The items in the bill of costs—the subject of the motion—the facts connected with them, and the report of the Taxing Master, sufficiently appear from the judgment.

Mr. Beytagh, Q.C. (with him, *Mr. Carton*), for the plaintiff.

Where documents have been fairly and reasonably entered upon the decree, the costs of briefing them to Counsel should be allowed as a matter of course: *Poor Law Commissioners v. Fitzgerald* (1), *Haslam v. O'Connor* (2), *Ex parte Hutchinson* (3), and the Taxing Master has no discretion in the matter. The costs of briefing the correspondence ought to have been allowed: *Beamish's Trusts* (4); *Churton v. Frewen* (5); if not, the original letters should, at the risk of loss, be sent to Counsel.

Mr. P. Martin, for the defendant.

The Master allowed for the material parts of the correspondence; it would be impossible for him to allow for it all: *Stephens v. Lord Newborough* (2). A bill of this nature did not require to be submitted to senior counsel. The costs of making measure-

(1) 7 Ir. Jur. O. S. 110.

(2) I. R. 6 Eq. 615.

(3) I. R. 7 Eq. 56.

(4) 5 I. Law Times 104.

(5) 36 Law Journ. Ch. 660.

(6) 11 Beav. 403.

Ante, p. 99.
Ante, p. 91.

Ante, p. 72.

ments, &c., were properly disallowed: *Bewley on Costs*, 54; *May v. Selby* (1); *Severn v. Olive* (2); *Laing v. Bowes* (3). The question as to the length of the briefs was entirely in the discretion of the Master; *Adair on Costs*, 272; *Pilgrim v. S. and D. Railway Company* (4); *Gower v. Donovan* (5).

V. C. Court.
1873.

The VICE-CHANCELLOR:—

The circumstances under which the questions now before me have arisen are somewhat peculiar. The suit, which is one for enforcing the specific performance of an agreement for a lease disputed by the defendant, was set down for hearing upon replication. After all the proofs had been made and the case had come into the paper of causes, a consent was entered into by which the defendant submitted to a decree as prayed, with costs, and by which the proofs to be entered upon the decree were agreed on. Thereupon a decree was made according to the consent, without having the case opened or any discussion in Court, and the plaintiff's proofs, as specified in the consent were entered as readings upon the decree. Those proofs consisted, amongst others, of a long correspondence in reference to the proposed lease, a number of drafts of it which passed from time to time between the parties and their agents, and a number of vouchers for the plaintiff's expenditure upon the premises upon the faith of the agreement—all which were specified in the list of proofs referred to in the consent and decree. The plaintiff's costs under the decree having come before one of the Taxing Masters for taxation, a number of items, amounting to a considerable sum, were disallowed by him, as to which I am asked to direct him to review his taxation.

The first of these items is a charge for a copy of the correspondence laid before counsel for the purpose of drafting the bill. The Taxing Master reports that he has disallowed this item, as he considered that the copies were unnecessarily made, but that he allowed a charge for instructions for the bill, which, I presume, he considered was sufficient to cover the expense of any necessary

(1) 1 Dowl N. S. 708.

(2) 6 Moore 235.

(3) 3 M. & S. 89.

(4) 8 C. B. 25.

(5) 2 I. L. R. 333.

V. C. Court.
1873.

extracts from the correspondence; and I find also that he has allowed a small portion of the charge for copies of letters. I see, therefore, that the Master has exercised his discretion as to this item, and the question being one of amount, and not of principle, I do not feel at liberty to interfere, though from the nature of the case made by the pleadings which I have read, I think it would have been impossible for counsel to prepare the bill without a careful perusal of every material letter that passed in reference to the agreement for, or the terms of, the proposed lease.

The next class of items consists of charges for submitting to senior counsel the draft of the bill prepared by junior counsel, also the draft of the amendments afterwards prepared by junior counsel, and the answers of the plaintiff to interrogatories administered by the defendant. I consider this class of charge to be within the discretion of the Master, and one in which the Court should not ordinarily interfere; and I do not find any sufficient ground here to lead me to think he has wrongly exercised that discretion.

The next class of items consists of charges for the expenses and remuneration of witnesses who were sent by the plaintiff to the lands to measure and value the plaintiff's improvements thereon. These witnesses have made affidavits which have been entered on the decree, and the costs of which have been allowed. The Taxing Master has disallowed sums paid them for their respective measurement and valuation. He has reported to me that these are not charges against the opposite party; and in this opinion he is supported by the cases referred to at common law, where matters of this nature are of more frequent occurrence. I cannot see why a different rule should be followed in this Court as to such charges. I have applied to Mr. Colles, the Taxing Master of the Common Law Courts, for information as to his practice, and he has favoured me with a statement on the subject, by which it appears that it is the settled practice at Common Law, both in England and Ireland, that in addition to the travelling expenses, and compensation for loss of time in attendance at the trial, a civil engineer, if he makes a map which is given in evidence, gets in addition a sum varying from £3 to £5 for the map, but that he cannot, as against the party, get anything for measurement or

valuation to qualify himself for giving evidence. The case of *Churton v. Frewen* (1), before Malins, V.C., appears to conflict with that rule to some extent; but I apprehend that case rests on its own circumstances, and I do not find that the authorities in the Courts of Common Law, cited to me, were referred to. I am accordingly of opinion that the Taxing Master has properly disallowed these items.

V. C. Court.
1878.

The last item is the largest in its amount, and the most important in its nature; it is the charge for briefs for the hearing, from which the Master has deducted more than one half. Charges of this nature are generally so much matters of amount, and therefore properly and necessarily in the discretion of the officer, that the Court should not interfere except a matter of principle is involved. There is no species of charge that requires a more careful supervision, or as to which it would be more dangerous to limit the exercise of the Master's discretion. It was contended by the plaintiff that that discretion is altogether excluded by the entry of documents upon the decree as read in evidence, and that, when the Master finds any document so entered, he is bound to allow a full brief. This was a question of so much importance, that I deemed it right to make a further inquiry of the Taxing Master as to the practice of the office, and requested him to state what that practice is, as to the allowance of costs on taxation between party and party of briefs of documents entered on decrees as readings, which, if not so entered, the Taxing Master might consider unnecessary to be briefed. The Taxing Master has, in reply to this inquiry, informed me that a discretion is exercised in such cases, and sometimes, even where documents are taken down on the decree, some are disallowed as unnecessary briefing, and that each case depends upon the particular facts. It is satisfactory to me to know that this is so, as I was rather under a different impression, and I was, consequently, in the habit of myself directing the Registrar not to enter on the readings documents which, though unobjected to, seemed to me unnecessary to have read in evidence, lest, by entering them, costs should be unnecessarily increased. My knowledge of the Master's possessing and exercising this discretionary power shall not prevent me from

(1) 36 Law Journ. Ch. 662.

V.-C. Court.
1873.

still following the same course, for it is advantageous to preserve every check upon excessive charge. I believe that, under the old system of taxation, it was of course for the Masters to allow full briefs of all documents so entered, and on inquiry from one of my officers, Mr. Campbell Moore, who has had an experience of upwards of fifty years, and whose skill on such questions is considerable, he has informed me that such was always the practice of the Masters in Ordinary before the appointment of the Taxing Masters. I apprehend that the exercise of the discretion stated by Master Coffey originated with the G. O. of 13th April, 1842, followed by the 157th G. O. of 1843, the terms of which are quite large enough to confer it upon the officer. I think that the reasonable principle on which the Taxing Master should act is that *primâ facie* all documents appearing as readings upon the decree are proper to be briefed to counsel, but that he is still bound to look into the matter, and to disallow the costs of such as, upon examination, he shall satisfy himself were unnecessary to have briefed. This wholesome discretion will not be interfered with by the Court, except in cases where a principle is concerned, or where the Court sees that the Master has fallen into some error as to the grounds upon which such readings were entered as read. And here I may observe that it was altogether upon the admission and consent of the Defendant himself that all these documents were so entered. If he had thought any of them unnecessary, and only leading to excess of charges, he should have guarded himself by having them excluded from the list of proofs agreed on. It is not reasonable now to call upon the Court to enter upon a consideration of which of those documents were necessary proofs; and if the Taxing Master had allowed briefs of them all, I should, under the circumstances, have declined to review his taxation. I have been obliged to read the pleadings in the case, and I have arrived at the conclusion that the Taxing Master has fallen into a mistake as to the purpose for which the four drafts of the lease contained in the briefs were relied on. He seems to have assumed that the contention was as to the form of the lease to be granted, and not as to the existence of a binding agreement. The latter was the real question; and, to establish that agreement, I am of opinion that all these drafts were of much importance. I should, if the case

had come to a hearing, have required to examine each of them, and I think counsel should have had briefs of them all. *V.-C. Court.*
1873.

Another question in dispute was as to the improvements alleged by the plaintiff to have been made by him on the faith of this agreement, the making or at least the extent of which was disputed by the defendant. I am of opinion that briefs were properly made of vouchers to prove the making and cost of permanent and substantial improvements, such as building and drainage works, but not of such expenditure as seeds or manures.

I shall therefore direct the Master to review his taxation of item No. 371, by allowing briefs of the four drafts, and of the vouchers for expenditure in building a farm-house and offices, and in making permanent improvements upon the lands.

I shall refuse the rest of the motion, and each party must abide his own costs.

Solicitor for the plaintiff: *Mr. Michael M'Namara.*

Solicitor for the defendant: *Mr. W. F. Henderson.*

JAMESON AND CO. v. ROYAL INSURANCE CO.

Queen's Bench,
1874.

(*By permission, from 8 Ir. L. T. 375.*)

Jan. 27.

*Costs—Shorthand report—Construction of model—Sheriff's fee for jury panel—
Briefs for new trial motion.*

MOTION, that the Taxing Master's certificate, disallowing certain items charged in plaintiff's bill of costs, be remitted to him for revision. The action, which was brought on foot of a policy of insurance, was tried before Barry, J., and a special jury, when a verdict was had for the plaintiffs.

Exham, Q.C. (with him *Robertson*), in support of the motion:—

The hearing of the case occupied three days, and the inquiry turned almost wholly on a question whether the risk on the policy had been increased by the construction of certain coils towards the elucidation of which a model had been obtained by the plain-

Queen's Bench.
1874.

tiffs at a cost of £10. That was disallowed on taxation, together with £21 6s. 2d., half the shorthand writer's bill; £46 19s., incurred in the preparation of briefs to resist a new trial motion; and £1 3s. 6d., sheriff's fees. The plaintiff's attorney had agreed with the attorney for the defendants as to the necessity of having a shorthand report of the evidence, and upon that report Mr. Serjeant Armstrong grounded a certificate upon which a conditional order for a new trial issued, rendering it necessary to have the whole briefed for the motion. Four days after the conditional order issued the matter was settled. The sheriff's fee disallowed was one of £1 3s. 6d. for the jury panel, which was the amount always paid, though the Master never allowed more than 10s. 6d.

A. M. Porter, Q.C. (with him Holmes), contra:—

It has been the uniform practice never to allow for models, which are manifestly only for the convenience of counsel. The charge for the shorthand writer's report was a matter of arrangement between the parties, whereby each was to pay half the expense, £42 12s. 4d., and the plaintiffs cannot now fairly seek to surcharge their share on the defendant. Then, the brief for the new trial motion was prepared, not after the conditional order issued, but by anticipation during the long vacation.

WHITESIDE, C. J., said that the Court were of opinion that the shorthand writer's bill and the sheriff's fee should be disallowed, but that the other items for the construction of a model—thought by his brother Barry, who tried the case, to be material and necessary—and the preparation of briefs should be allowed, and they would make a rule accordingly.

HICKEY v. O'CONNOR.

Com. Pleas,
1874.

(By permission, from I. R. 8 C. L. 509.)

Nov. 3.

(Before MONAHAN, C.J., KEOGH and MORRIS, J.J.)

Costs—Taxation—Common Law Procedure Act, 1853, s. 243—Common Law Procedure Act, 1856, s. 97.

Action for the conversion of the alluvial soil of the bank of a river alleged to be the plaintiff's ; judgment by default, and damages assessed by a jury at £3 :—

Held, That the action having been brought *bonâ fide* for the purpose of trying a right, the circumstance of the defendant not defending it, and thus waiving the question, did not disentitle the plaintiff to full costs.

MOTION for certificates to entitle the plaintiff to full costs, under the Common Law Procedure Act, 1853, sec. 243, the action having been brought to try a right to property more extensive than the sum sued for, and not being capable of being tried in the Civil Bill Court.

The action was brought to recover damages for the conversion, by the defendant of soil deposited on a portion of the bed of a river alleged to belong to the plaintiff, but, substantially, to try the right to the bed of the river. The defendant allowed judgment to go by default; and an inquiry to assess damages having been had before the Master, in presence of the defendant, who, though he admitted the conversion, asserted his right to the bed of the river, the jury assessed the damages at £3.

Heron, Q.C., for the plaintiff.

The action could not be brought into the Civil Bill Court (Common Law Procedure Act, 1856, sect. 97). Though the defendant did not defend the action, the plaintiff is entitled to the certificates, because he intended to try a right. In *Morrison v. Salmon* (1), Maule, J., says :—" Suppose a case can be put of a declaration in trespass or case (although I do not think it can) in which a right could not, by possibility, come in question, still, if it should appear to the judge that the plaintiff had really intended

(1) 2 M. & G. 394, 395.

Com. Pleas.
1871.

to try a right, I conceive that the former would have power to certify. If an action be really brought to try a right, whether it is calculated for that purpose or not, the party is within the letter, and, as it seems to me, also within the spirit of the Act." And *Shuttleworth v. Cocker* (1) also shows that the judge is not deprived of the power of certifying that the action was really brought to try a right, merely because the defendant has not chosen to contest it by his defence.

Morgan Kavanagh, contra.

This case is not properly brought before the Court. It is on review of the Taxing Master's report that the question of costs ought to arise: *Bennett v. Scott* (2). Where the judgment goes by default, as in this case, the Taxing Master has no jurisdiction: *Armstrong v. Dwyer* (3); where Monahan, C.J., says: "Where, by not pretending to any right, he (the defendant) allows judgment to go by default, and admits himself a wrong-doer, the right is not brought into question."

MONAHAN, C.J.:—

We are of opinion that plaintiff is entitled to the certificates he seeks. If an action be brought *bonâ fide* for the purpose of trying a right, the circumstance of the defendant's not choosing to defend it, and thus waiving the question, does not disentitle the plaintiff to his costs.

Order accordingly.

Attorney for plaintiff: *Thomas V. Ryan.*

Attorney for defendant: *Thomas O'Connor.*

(1) 1 M. & G. 829. (2) 8 Ir. Jur. N. S. 206. (3) 1 Ir. Jur. N. S. 296.

ROBB v. CONNOR.

Rolls.
1874.

Nov. 24.

(By permission, from I. R. 9 Eq., 373, s. c. 9. Ir. L. T. R. 115.)

1875.
June 26.

Taxation of costs between party and party—Counsel's fees—Number of briefs in Court of Appeal—Fees to professional witnesses.

1. In estimating the amount of fees to counsel, the Taxing Master should always have regard to the difficulty and complication of the questions of law and fact involved in the case, and the importance of the result of it to the parties. The fees *bonâ fide* paid by a solicitor to counsel, and fairly required by the magnitude or complication of the cause, ought not to be reduced, but should be allowed on taxation between party and party.

2. Although two counsel only are heard in the Court of Appeal, the costs of three counsel in that Court should be allowed on taxation between party and party, where the difficulty and importance of the case render it proper to retain them; particularly in cases where three counsel had been allowed on taxation between party and party in the Court below.

3. The daily fee allowed to a professional witness on taxation between party and party is not necessarily to be limited to £3 3s. In this case a fee of £5 5s. a day was allowed to an engineer and architect of eminence employed under the direction of the Court.

MOTION, on the part of the defendant, that the Taxing Master should review his taxation.

The bill in this cause was dismissed with costs by a decree of the Master of the Rolls, dated the 21st of July, 1871. The plaintiff appealed, and the Court of Appeal in Chancery affirmed his Honor's decision on the 3rd of June, 1872. The nature of the suit is stated in the judgment.

On the taxation of the costs, as between party and party, Master Teeling allowed the plaintiff the costs of three briefs to counsel at the hearing at the Rolls (items 360, 362, and 364 in the bill of costs), but struck off £2 2s. from their respective fees of £14 14s., £12 12s., and £9 9s. He allowed a refresher of £2 2s. per day, and consultation fees of £2 2s. for each counsel. He disallowed the costs of one of the three counsel in the Court of Appeal (items 435 to 534=£26 3s. 8d.), and reduced the professional charges of Mr. M'Curdy, an engineer and architect, who was employed to examine the premises in Belfast, from £13 16s. 8d. to £10 0s. 9d. (item 560).

Rolls.
1874.

The defendant having moved to review the taxation as to the above-mentioned items, his Honor referred the matter to the Taxing Master, who reported as follows:—

“As to item 360.

“This was a fee of £14 14s. on hearing motion for a decree.

“Having regard to the proceedings in the case, the amount of fees paid to counsel, and the fees paid by the plaintiff, and considering that I allowed three counsel at the hearing of the motion, in my judgment £14 14s. seemed too liberal a fee, and in consequence I reduced it by £2 2s.

“The same remarks refer to items 362 and 364.

“As to items No. 435 to 534.

“These are the costs incurred in consequence of employing a third counsel on the appeal in this case, and which I disallowed, on what I understand to be the usual practice in the Court of Appeal; which is, not to have more than two counsel for respondents or defendants, except in very rare cases, where there are a variety of respondents or defendants having separate or distinct interests. But, as that was not the case in the present instance, and as it was asserted that only two counsel were heard on the argument in the Court of Appeal, I disallowed the third counsel.

“As to item 560.

“This was a charge of £13 15s. 8d. for professional fees paid to Mr. John M'Curdy, architect, of which the following are the particulars as furnished by him:—

	£	s.	d.
“To visiting Belfast in <i>Robb v. Connor</i> , by order of the Court, two days, £5 5s,	-	10	10 0
“To attendance in Court (query evidence),	-	1	1 0
“To travelling expenses to Belfast, &c.,	-	2	5 8
		<hr/>	<hr/>
		£13	16 8

“It will be observed that Mr. M'Curdy charges £5 5s. per day. I understand, however, that £3 3s. per day is the usual fee allowed to gentlemen of his profession. And in the absence of any special agreement or order to allow larger fees, I considered I would not have been justified had I done so, and, consequently, I reduced his charge of £5 5s. per day to £3 3s.

"I allowed him £1 1s., his charge for attending Court to give evidence.

"On taking an account as to the item £2 5s. 8d. for travelling expenses, in my judgment he made an undercharge of 8s. 1d., which I added to his charge of £2 5s. 8d., the result of which was a deduction of £3 15s. 11d. from his entire charge of £13 16s. 8d."

Mr. W. D. Andrews, Q.C., and *Mr. Twigg*, for the defendant, as to items 360, 362, 364, contended that the amount of counsel's fees was a matter in the discretion of the solicitor, to be exercised *bonâ fide*, and with a due regard to the exigencies of the case, and referred to the *Galway Election Petition* (1).

Ante, p. 103.

As to the items 435 to 534, they contended that there was no rigid rule which precluded the taxation of three briefs to counsel in the Court of Appeal. They had been often allowed by the Taxing Masters, where the case was of sufficient importance to require the service of three counsel. Such a rule might be very detrimental to the client. One of his counsel might be required to attend in another Court. The counsel who was not retained in the Court of Appeal, but who acted for him in the Court below, might be required to take a brief for his adversary, and both he and the counsel would be placed in a most embarrassing position.

As to the architect's charges, they were of a most moderate character.

Mr. Bruce, for the plaintiff:—

The amount of the fees allowed the counsel in the Court below is not a matter of principle, and is completely within the Taxing Master's discretion, *Smith v. Baker* (2); so are the fees to the architect.

Even at the first hearing, three counsel are not always allowed between party and party, although three counsel are heard, *Haslam* *Ante*, p. 99. *v. O'Connor* (3); but in the Court of Appeal the uniform practice is to hear but two counsel.

(1) *Ir. R.* 7 C. L. 445. (2) 28 L. P. N. S. 669. (3) *Ir. R.* 6 Eq. 615.

Rolls.
1874.

THE MASTER OF THE ROLLS :—

1875.
June 26.

This is an appeal from the certificate of the Taxing Master on the taxation of the costs of the defendant as between party and party. The case was argued before me some time ago, and I kept it over for judgment, with a view of thoroughly considering the practice which ought to prevail in reference to the matters in controversy. The questions involved strike me as being of great importance, affecting not merely the parties to this cause, but also the two legal professions, the Bar and the solicitors, and in addition the interests of the public, any one of whom may have to assert his rights in this Court at any moment.

The appeal is conversant with three classes of items, viz. :— First, counsel's fees on the briefs held at the hearing of the cause at this Court. Secondly, the costs of employing a third counsel in the Court of Appeal. Thirdly, certain charges for Mr. M'Curdy, an architect, in respect of a visit to Belfast, to inspect the premises the subject matter of the suit, made under the order of the Court of Appeal.

Before I enter upon the precise questions which arise on this appeal, it is right that I should state what the case was, and what were the questions involved in it, both in point of law and in point of fact. I heard the case, and I can state that it was as serious a case as could be brought to a hearing in this Court. The bill was filed substantially for a mandatory injunction to compel the defendant to take down a long range of buildings which were in course of erection in Belfast on the allegation that they obstructed the light to certain valuable premises occupied by the plaintiff, Mr. Robb, and injured the carrying on of his business, to which perfect and uninterrupted light was essential. The premises which Mr. Robb, the plaintiff, occupied, were subject to a rent of about £400 a year, and were of a very extensive character; and up to the time when the defendant commenced his buildings the plaintiff had enjoyed, as he stated, uninterrupted light of a most valuable character, which was required for the sale of goods he dealt in—silks, satins, cottons, and velvets, by wholesale and retail; and if his case had been well founded in fact, it is easy to conceive the injury which might have been caused to his trade and property. The defendant was vitally interested in the suit. He

commenced, indeed almost completed the buildings close to the plaintiff's premises, and invested a large sum of money in them, and was about building other structures in the neighbourhood; and if he was restrained from carrying them on, and if an injunction had been granted commanding him to pull down the buildings already erected, it would have placed him in serious embarrassment—nay, perhaps, might have caused his ruin. No two litigants could well be engaged in a Court of Justice in a more weighty controversy.

The difficulty of the questions at law which arise in a case relating to an alleged diminution of light is well known. The case before me involved an examination of all the authorities, from the earliest to the latest, particularly the cases of *Jackson v. Duke of Newcastle* (1), and *Yates v. Jack* (2). The very conflict of opinion between the learned Judges who decided these two cases shows that if the point involved in them arose here, it in itself stamped the case with unusual importance. Now one of the many questions involved in the case was that very point, whether a plaintiff coming into a Court of Equity alleging that his light is diminished, can obtain an injunction, though the diminished light is more than sufficient for the business which the plaintiff is then actually carrying on? That delicate and nice question, amongst others, was argued before me at considerable length. I came to the conclusion which, in my judgment, the authorities at the time warranted, and which a subsequent decision has confirmed, *Aynsley v. Glover* (1), that the plaintiff was entitled to all the light which he had theretofore enjoyed, whether the entire of it was necessary to the business he was then actually carrying on or not, inasmuch as he might afterwards, for other branches of trade, require more light than was necessary to the trade he carried on in the premises when he filed his bill. There were also questions of considerable difficulty connected with the nature of the light itself—the physical nature of light, and the obstructions to it which buildings cause, particularly where they are very extensive and contain several stories, and cover a great space of ground, presenting various angles at different points. Numerous plans,

(1) 3 De G. J. & S. 275.

(2) L. R. 1 Ch. App. 295.

(3) L. R. 18 Eq. 544.

Rolls.
1875.

diagrams, and photographs, were produced, and the evidence of several competent engineers and scientific men was resorted to. The evidence was, in fact, most voluminous, and the case was heard before me for five days; and it did not occupy a single minute too long. Although I decided, in substance, the question of law in favour of the plaintiff, I decided all the questions of fact against him—for I held that there was no such obstruction to his light as gave any right to come to this Court. No doubt, that was a difficult question; and in coming to the conclusion I did, I may now say that I really felt that difficulty even more than I enunciated in my judgment; for I do not state the different phases of thought which present themselves to me, in the consideration of the case. If I am able in the end to come to a conclusion, I state it, giving my reasons, and if the parties are dissatisfied with it I leave them to challenge it elsewhere. The plaintiff in this case did challenge it. I dismissed his bill with costs, and he appealed. He was quite warranted in doing so. The Court of Appeal seems to have felt the identical difficulty on the matter of fact which occurred to me, and so much so that they thought it advisable, before adopting the conclusion which I came to on the matter of fact as to there being no obstruction, to send down a gentleman of considerable experience and great skill to examine the whole state of things at Belfast, and report his view as to the alleged obstruction. Accordingly, both parties having assented to the nomination of Mr. M'Curdy, the architect—and a better selection could not have been made, for he appears to be a man of learning in his profession, and one who thoroughly understands his business and exercises great caution before committing himself to an opinion—he proceeded from Dublin, spent two days in Belfast, made his report, and, as I understand, was also examined in open Court on an adjourned hearing of the appeal. The Court, after hearing Mr. M'Curdy, adopted my view, and dismissed the appeal, with costs. That was an unfortunate result to the plaintiff, but he had accepted the risk when he filed the bill.

Such is the short history of the cause. Now, there were delivered for the hearing in this Court three briefs to counsel, with the following fees—a fee to the senior Queen's Counsel of £14 14s., with a consultation fee of £2 2s.; to the second

counsel, £10 10s., with a similar consultation fee, and to the junior counsel a fee of £9 9s., with a similar consultation fee. Refreshers of only £2 2s. per day were given to each of the counsel, senior and junior. The costs which, under the decree, were to be taxed against the plaintiff were, of course, only party and party costs. It is perfectly clear that on taxing the costs between party and party the Taxing Masters must act on the well-known rule, that there should be no extravagance, nothing of what has been called "the luxury of payment." The fees on such a taxation should be measured by the fair exigency of the case; but, holding that principle most strictly, I feel bound to say that the fees which were given out to counsel on their briefs in this cause were as reasonably small as it was possible to hand to counsel in a case of this kind, while the refreshing fees, at all events, if viewed in reference to costs as between solicitor and client, were, in my judgment, scandalously insufficient. The fact that in a case of such importance as the one before me, involving great preparation, and conversant as it was with a most disputed and complicated state of facts, requiring constant attendance in Court, a Queen's Counsel in the first rank of his profession is expected to devote his whole day to it for a fee of £2 2s., sufficiently demonstrates that the scale of payment to counsel in this country is brought to the lowest point; and certainly the solicitor who marked such refreshers cannot well incur the imputation of extravagance. Judging from my own not very short experience at the Bar, and my general knowledge of the system in Ireland which regulates the amount of fees paid to counsel on their briefs, I do say that, as an almost invariable rule, such fees are of a most moderate character, and if there be an error on the side of extravagance it is very rare indeed. The Taxing Master in taxing these costs has dealt with them in this manner—he has taken from the fee of £14 14s. £2 2s., from the fee of £10 10s. to the second counsel £2 2s., and from the fee of £9 9s. to the junior counsel £2 2s. There seems to me no principle in this mode of clipping fees, and I cannot understand it. The Taxing Master, from his report, would seem to me to have had some regard to the amount of fees which the plaintiff paid his counsel; but I can discover no reason why, because a plaintiff or his solicitor is niggardly, a defendant

Rolls.
1875.

or his solicitor is not to deliver a proper fee to his counsel. I could understand a fee of £14 14s. being reduced to seven or eight or five or six guineas upon some alleged principles; but I must say I do not understand clipping or shaving fees in the manner in which they have been dealt with here. The proceeding would seem to me to be resorted to more through a desire to clip or take something off than through a desire to estimate the fee by a right standard—namely, the magnitude of the case and the nature of the questions involved in it.

The principle which I think should be acted on, and I am prepared to enforce, is this—that if a solicitor, acting *bonâ fide* within the rule I have above stated, delivers a brief with the fee marked thereon to counsel, *primâ facie* that fee ought to be allowed, even in party and party costs; otherwise the solicitor must be exposed in every case to the risk of having to pay out of his own pocket money which he honestly and *bonâ fide* paid to his counsel, unless he has taken the precaution of fixing the fee beforehand with his client. Acting on that principle I have no hesitation in reviewing the Taxing Master's decision, and directing him to allow the full amount of the fees paid to counsel on their three briefs. Three counsel were rightly allowed on taxation. The Master seems to have thought that this circumstance warranted him in somewhat reducing the fees. I cannot understand this view. It would surely be a very strange rule that any given counsel, whose advocacy is required, should get a smaller fee because two counsel are engaged with him instead of one. There is no such principle known to the law or to the profession. The gentlemen who were solicitors for the defendant in this case are gentlemen of great respectability, and all idea that their fees were given with any other view than the fair conduct of the case must be put aside. What was given was given, I am thoroughly convinced, with the sole view of fairly protecting the client from a tremendous risk to which the plaintiff's suit exposed him. The principle I have stated is the one on which the Court of Common Pleas in this country recently acted in reviewing the costs of the *Galway Election Petition* (1) in relation to the counsel's fees; and it seems to me to be one founded in justice and reason.

Ante, p. 108.

(1) *Ir. R.* 7, C. L. 445.

The next question is, whether three counsel ought to be allowed on the appeal? It is the general practice of the Court of Appeal to hear only two counsel. The Taxing Master proceeded on the ground that as two counsel only are heard in the Court of Appeal, he could only allow the costs of two counsel in that Court. The Taxing Master really appears to me not to have grasped the magnitude and importance of this case, and that is the foundation of the error into which I think he has fallen in disallowing, as he has done, three counsel in the Court of Appeal. Three counsel were heard in the Court below, and were allowed; and the principle which I am called on to affirm is that, in a case where three counsel are allowed in the Court below, if the case goes further, one of these counsel must be got rid of—no matter what the magnitude of the case may be, both as to the legal principles and the facts involved in it. A great deal more is to be done in a case by counsel than the mere argument of it in open Court; there is no man of the smallest experience at the Bar who does not know that such is the fact. I will not allow such a principle as the Taxing Master has acted on to prevail. I think that when a suitor in this Court is allowed three counsel on taxation, and when his adversary takes him to the Court of Appeal, if the magnitude of the case is such as to warrant the employing three counsel for the appeal, the costs of such three counsel ought to be allowed between party and party—that is my clear opinion. There is a case of much importance on this point, which was not referred to at the Bar on this motion, *Pierce v. Lindsay* (1). In England the ordinary rule is that briefs for more than two counsel are not allowed on taxation between party and party. I need scarcely say, at least to those who have any acquaintance with the practice of the Bar in the two countries, that if this suit had been heard in England, the fees given to two counsel there would have far exceeded the amount of the fees given to the three counsel here. The case I have mentioned was an appeal from the decision of Vice-Chancellor Wood (2), declaring that in taxing the costs of suit as between party and party, only two of the three counsel retained by the plaintiffs upon the hearing of an appeal should be allowed, and referring it back to the Taxing Master to review his

(1) 1 D. F. & J. 573.

(2) 1 John. 702.

Rolls.
1875.

certificate allowing the costs of the three counsel. At the original hearing the plaintiffs appeared by two counsel. On the appeal an additional Queen's Counsel was retained; and it was submitted to the Taxing Master that the examinations and depositions taken in Chambers under the decree had increased so much the bulk of the evidence which it became necessary to submit to the Court of Appeal, that this addition was requisite for the purposes of justice. The Taxing Master acceded to this view, and by his certificate allowed the costs of the three counsel, on account of the peculiar difficulty and importance of the case and the bulk of the pleadings and evidence on the appeal; he considered that the case was one in which an exception might properly be made to a general rule allowing the costs of two counsel only laid down in *Smith v. The Earl of Effingham* (1). It was argued, in support of the appeal, that there was no such rule as that supposed to have been laid down in *Smith v. Effingham*, but that it was altogether matter of discretion whether the costs of two or more counsel should be allowed; and that in taxing the costs of an appeal before the House of Lords the costs of three counsel are allowed where the nature of the case renders it proper to retain three counsel, although two only are allowed to address the House. It was not denied in the argument against the appeal that such was the practice. The Lord Chancellor, in giving judgment, says:—"There is no doubt that the general rule is to allow only two counsel as between party and party; but the question is whether that rule is an inflexible one, and those who affirm that the Taxing Master did wrong in allowing three counsel ought to prove it to be inflexible and without any exception. Now, instead of that, in each and every one of the authorities cited it was allowed that there may be an exception." He then refers to three cases which had been cited: "That being so, instead of being proved that the rule admits of no exception, it is allowed that the authorities say there may be an exception. It would be very unreasonable, I think, if there might not be an exception, because there are cases in which justice could not be done, in which the Court would not have the proper assistance which it has a right to expect, with two counsel, however learned." Then, after having referred to the facts of that case,

Lord Campbell says:—"The only argument urged against it has been that the plaintiffs were content with two counsel in the argument below. But surely that objection cannot be allowed to prevail. We do not know for what reason not more than two counsel were then employed, nor what effect the severe labour they undertook may have produced upon them. We must, I think, dismiss from our consideration the circumstance of there having been only two counsel employed below. Upon the appeal we have heard three counsel on each side, and, in my opinion, with great advantage. My conclusion, therefore, is that the Taxing Master's certificate was right." The Lord Justice Knight Bruce concurred, and Lord Justice Turner said:—"I agree with what has been said, but with the anxious desire that it should still be borne in mind that, as a general rule, the costs of two counsel only should be allowed, and that before the costs of three are allowed, it should in each case be clearly shown to have been essentially necessary, for the purpose of doing justice between the parties at the hearing of the cause, that three counsel should be employed." Now the only possible distinction that can be drawn between that case and this is, that in the Court above three counsel were heard. But it appears to me that nothing substantially turns on that fact.

The general principles of the case fully support the allowance of the three counsel in the Court of Appeal here in a case of this description. It is plain that it is only in exceptional cases, where the magnitude of the stake, the complication of the evidence, or the difficulty of the question of law warranted, that three counsel will be allowed on the taxation of party and party costs in the Court of Appeal; but I think that if three counsel are allowed in the Court below, and the nature of the case reasonably requires the employment of three counsel in the Court of Appeal, they ought to be allowed there, particularly when they are the same counsel who argued the case in the Court below. And when one considers the very small amount for which the best advocacy in this country can be had in the Court of Chancery, I consider that such a rule, so far from being a hardship upon suitors, is one directly beneficial to their interests. Therefore, I think that the Taxing Master's decision on these items should be reversed, and I shall

Rolls.
1875.

direct him to allow briefs and fees for three counsel in the Court of Appeal.

The next question on which the Taxing Master has miscarried is on a very small matter, and I am astonished that any question should have arisen on it. I am very much afraid, from what has transpired in this case, that there is a tendency in the office, on taxation, to clip costs by reducing the amount of items, for the sake of clipping alone. This is a course which I cannot sanction or allow. This Court must now and then have occasion to resort for assistance to the important profession of engineers and architects. The Court of Appeal, as I have mentioned, sent down Mr. M'Curdy to Belfast to examine the buildings which were the subject of this suit. He went and spent two days there, and he attended in the Court of Appeal and gave his evidence there, and he presented a bill for his fees, the items of which are as follows:—
 “To visiting Belfast, in *Robb v. Connor*, by order of the Court, two days at £5 5s., £10 10s.; to attendance in Court, £1 1s.; to travelling expenses to Belfast, £2 5s. 8d.”; the total of which is £13 6s. 8d. Mr. M'Curdy is a gentleman, as I have already indicated, of eminence in his profession. He spends two whole days in Belfast; he attends the Court of Appeal; he gave, I believe, most valuable assistance to that Court. The Taxing Master has struck off £2 2s. from each of his daily fees, reducing them to £3 3s. instead of £5 5s. There is no principle in that, except that of badly paying a professional man for valuable services, rendered under most peculiar circumstances. Surely, it is not to be expected that a professional man of eminence should go from Dublin to Belfast—substantially under the order of the Court—on such a business as Mr. M'Curdy was entrusted with, and be satisfied with three guineas a day. I shall direct the Taxing Master to allow the original fees charged by Mr. M'Curdy. If I were to give any opinion as to the amount, I should say that his charges were of a most moderate character indeed—too small instead of being too much.

It is not to be gathered from anything I have said that I deprecate the vigilance of the Taxing Officer in watching over such items as I have been dealing with, or in examining into each case as it comes before him—even in the case of counsel's fees, if they

strike him as too large or extravagant ; but his decision as to the allowance of those fees or reducing their amount must be founded upon a thorough examination of the nature of the particular case, and upon a discriminating judgment founded thereupon.

Solicitors for the plaintiff : *Messrs. Dalton & Smith.*

Solicitors for the defendant : *Messrs. H. Wallace & Co.*

Rolls.
1875.

BIRMINGHAM v. BILLING.

(*By permission, from I. R. 9 C. L. 287.*)

Com. Pleas.
1875.

March 12.

(Before KEOGH, J.)

Practice—Costs—Taxation—Detinue—Nominal Damages—Certificate—Common Law Procedure Act, 1853, s. 243.

The plaint contained the money counts and a count in detinue ; and the plaintiff obtained a verdict for £40 on the former and for 1s. damages on the latter, but did not get a certificate for costs ; the plaintiff's verdict on the money counts having been afterwards changed by the Court into a verdict for the defendant :—

Held, (1) that the plaintiff was entitled to no more than half costs on the count in detinue ; and (2), that the costs in respect of the money counts ought not to be taxed against the defendant, who ultimately succeeded on those counts.

MOTION that the Taxing Master should review his taxation, by which he allowed the plaintiff full costs as regards the items in the bill of costs which related to the count in detinue, and disallowed the defendant any costs as regards certain items relating to the money counts.

The plaint contained the usual money counts against the defendant, as executor ; a count in trover, and a count in detinue for title deeds ; and prayed a return of the deeds and £30 damages for their detention. The defendant pleaded (1) traverses ; (2) as to the money counts, discharge and satisfaction ; and (3) as to the count in detinue, a lien on the deeds.

At the trial the jury found for the plaintiff £40 on the money counts, and also on the count in detinue with one shilling damages, the defendant undertaking to deliver the deeds to the plaintiff ;

Com. Pleas.
1875.

and the judge reserved leave to the defendant to move to set aside the verdict for £40 on the money counts and to enter a verdict for the defendant, if the Court should be of opinion that the judge had misdirected the jury. The plaintiff did not apply to the judge for a certificate of costs.

In pursuance of the leave reserved, the Court set aside the verdict for the plaintiff on the money counts and entered a verdict on these counts for the defendant, leaving standing the verdict for the plaintiff on the count in detinue.

The Taxing Master having allowed the plaintiff full costs on all items in respect of the count in detinue and allocated the costs on the money counts, the defendant now sought for a direction to him to allow the plaintiff but half costs on the count in detinue, and to disallow her any costs as regards any of the items in respect of the money counts.

Beytagh, Q.C., and *Roper*, for the defendant:—

Ante, p. 78.

Ante, p. 82.

The plaintiff's costs ought to be half costs: *Byrne v. M'Evoy* (1); *Leonard v. Brownrigg* (2).

Monahan, Q.C., and *MacDermot, contra*:—

The 243rd section of the Common Law Procedure Act, 1853, does not apply to detinue: *Danby v. Lamb* (3); because detinue does not contemplate damages, but merely the return of the goods. See *Bewley on Costs*, p. 81.

KEOGH, J.:—

This is a case which is not altogether free from complication, yet, on the whole, the facts appear to me to be sufficiently plain. The action was for a money demand of over £200, claimed against the defendant as executor; and the summons and plaint also contained a count in detinue for certain title-deeds alleged to be the property of the plaintiff. In answer, the defendant pleaded, in addition to the general traverses, a defence of lien on the deeds for certain unpaid services rendered by the deceased testator as solicitor for the plaintiff, and as regards the money counts discharge

(1) I. R. 5 C. L. 568.

(2) Irish Law Times, 1872, p. 7.

(3) 11 C. B. N. S. 423.

and satisfaction. The substantial question then to be tried was as to the money demand of £200, and, as regards this sum, the defendant sustained his case, except as to a sum of £40, which appears to have been made up of cash payments (together with a sum of £13 realised from plate sold), advanced by the plaintiff to the deceased solicitor from time to time for the purpose of carrying on a suit in which she was then engaged. The consequence was that at the trial the plaintiff recovered a verdict for the £40, but this was subject to a reservation that it should be turned into a verdict for the defendant if the Court should so determine; and, accordingly, the Court, thinking, I presume, that the money was expended for her in litigation, and that she was not without some benefit, and negating a suggestion of negligence on the part of the solicitor, reversed the verdict, and entered it for the defendant. The *postea* then stood, and now stands, in this position—that a verdict appears for the defendant on the money counts, while the plaintiff holds a verdict on the count in *detinue*, recovering the deeds sought, and one shilling for their detention. I think it plain, therefore, that the real question at issue was as to the money demand, and on that the defendant has succeeded. In this state of facts, I am asked to review the taxation of costs effected by the Taxing Master, who has allowed the plaintiff full costs on the verdict in *detinue* of one shilling, and the return of the deeds, which latter seems to have been settled rather by arrangement than in exactly the formal manner; and, further, he has allowed several items relating to the money counts to be taxed in favour of the plaintiff. Now, I have not, under such circumstances, much difficulty in determining the proper allocation of the costs. Suppose that, instead of one *plaint* there had been two—one in *detinue*, and the other on the money counts. Then, if in the action for *detinue* the plaintiff merely recovered a verdict for one shilling, could it be contended he was entitled to full costs? I think not. The 243rd section of the Common Law Procedure Act, 1853, applies directly, and rules this point. It says that certain specified fees shall be chargeable against the plaintiff or the defendant in respect of specified items, provided that, in case the plaintiff (among other things) “in any action for any wrong or injury disconnected with contract” shall recover a sum not exceeding £5,

Com. Pleas.
1875.

“the plaintiff shall be entitled to no more than half costs,” unless “the judge certify;” and in Schedule “C” of the Act detinue is classed among the wrongs independent of contract. My view of this matter is strongly corroborated by the case of *Byrne v. M-Eroy* (1). That is a direct authority in point. Of course, I am aware that ingenious distinctions may be sought to be raised between that case and the present; but I cannot understand why, if the farthing costs there (which is the same as the shilling here) would be sufficient to carry full costs, the Court would listen to the long discussion which was there entertained for the purpose of showing that sums of money recovered on money counts could not be added to similar sums on verdicts on counts of tort, so as to make the consolidated sum carry costs. Of course, they considered that the farthing there would not carry costs, and therefore it was sought to consolidate the sum recovered. And the CHIEF JUSTICE there says:—“In this case the plaintiff has recovered by verdict on counts of tort alone, for the action of detinue is an action of tort. Therefore we do not consider the authorities I have referred to applicable to this case. We are of opinion that the plaintiff cannot add a sum paid into Court on a count in contract to a sum recovered by verdict on counts in tort; that the Taxing Master has proceeded on a false principle; and that the plaintiff is only entitled to half costs.” The very reason here given by the Chief Justice for not allowing more than half costs is that the plaintiff was not at liberty to add the sums recovered in contract to those recovered in tort, which, if added, would have carried costs. But what would have been the necessity of adding the sums if a verdict for a nominal amount in detinue would, of itself, have carried full costs? And it cannot be maintained that the plaintiff laboured under any disability by reason of the law standing thus, for it was fully open to her to apply after verdict for a certificate that the action had been brought “for the purpose of trying a right to property more extensive than the sum sued for.” This was not done; but, as £40 had been recovered at the time by a verdict which was subject to a reservation, it was not contemplated that the verdict would be reversed, and the consequence was that when the full Court reversed the verdict it

could not grant the certificate. I, therefore, think that, as only this nominal sum of one shilling has been recovered on account in detinue, which is an action of tort, and as there has been no certificate, that no more than half costs should be allowed the plaintiff. As regards the remaining portion of the case, I think that, as a matter of principle, all the items of the bill of costs which deal exclusively with the preparation and trial of the money counts should be allowed to the party who has substantially succeeded on the money counts—viz., the defendant; and I do not agree with the contention of the plaintiff's counsel, that because the defendant pleaded to the count in detinue a traverse of the plaintiff's property in the deeds, and a defence of lien, that therefore such another proof of title was challenged as if another Claimant personated another Tichborne. I think that the items in the bill of costs which refer to the money counts ought not to be taxed against the party who was successful on those very counts, and I shall so direct the Taxing Master.

Com. Pleas.
1875.

Motion granted.

Attorney for the plaintiff: *Macnamara.*

Attorneys for the defendant: *Meade & Colles.*

NEWRY STEAM AERATED CO. v. ———.

(*By permission, from 9 Ir. L. T. 194.*)

Tyrone Quar.
Sessions.

1875.
April 6.

(Before SIR FRANCIS W. BRADY, Bart., Q.C.)

Mr. Dickie (on behalf of the company) stated the case, and said that he had been tendered by *Mr. Moore*, attorney for defendant, the amount of the debt (£2 5s. 9d.), with 2s. costs of civil bill, after the process was served, proceedings taken, the proper notices served for the defendant to appear in person, and for the production of accounts, &c. He (*Mr. Dickie*) refused to receive the amount tendered by *Mr. Moore*, unless an additional sum of 2s. 6d., to which he had a right in point of law, as costs was also paid. He drew the attention of the Court to the fact that, in the schedule

*Tyrone Quar.
Sessions.
1875.*

of fees, separate charges were made in ejectment and legacy processes for instructions and notices, and for the entry there was a fee for all civil bills. He had done all that was necessary to be done in the case, and he was, therefore, entitled to the fee of 2*s.* 6*d.* Mr. Dickie then enumerated several places—County Carlow, County Cork, Queen's County, Roscommon, &c.—where this rule was adopted and acted on universally, as he was informed, and referred to the schedule of fees allowed by the Act of Parliament, from which he argued that the 6*d.* fee was for drawing up and signing the civil bill itself, and that the cost up to the time of tendering the money should also be paid along with it.

Mr. Moore admitted that *Mr. Dickie* was entitled to the fee, but the question arose as to whether or not it was properly charged against the defendant. He (*Mr. Moore*) thought that it ought to be charged against the plaintiff, who should pay for all work done up to the time that the money was tendered. The point, of course, was whether or not the fee was chargeable against the defendant.

Mr. Dickie, in reply, referred his worship to the 21st of the rules of 1851, which required that in case of a tender after the action was brought, it should be accompanied by the costs of suit up to the time of the tender.

HIS WORSHIP said that there were several duties to be done on behalf of the plaintiff, and notice served before the case could come up for hearing, and all for the small fee of 2*s.* 6*d.*, as allowed by the law. The fee was very moderate. He was clearly of opinion that the fee of 2*s.* 6*d.* was included in the costs under the 21st rule, as portion of the costs of suit up to the time the money was tendered, and, therefore, the tender must be accompanied with this fee, as the 153rd section of this Act made them costs between party and party, and taxable against defendant. He, therefore, granted a decree for the amount, fee included.

SMART v. VERDON.

*(By permission, from 9 Ir. L. T. 598).**Chancery Tax-
ing Master's
Office.*

1875.
Nov. 20.

(Before MASTER COFFEY.)

THE following judgment was delivered by MASTER COFFEY, on the 20th November, 1875, on the taxation of costs in this suit:—

Before referring to the objected items of charges in the plaintiff's bill of costs, I think it necessary shortly to refer to the pleadings.

This suit was instituted for the purpose of seeking relief against the defendant—founded upon charges of a very serious character indeed; and, from the nature of the pleadings, there must have been involved great care and close inquiry with the view of collecting and bringing together a mass of information arising out of peculiar and unusually complicated dealings between the parties in this suit, so as to enable the plaintiff to put upon the file a complete narrative of her case; and, from the nature of the answer filed by the defendant, an amended bill of a voluminous character became necessary, and required great care and consideration on the part of solicitors as well as counsel with a view to its consideration in consultation before final adoption.

From a perusal of the pleadings and affidavits in aid of the respective cases put forward by the parties, I was impressed with the magnitude and importance of the case which, of course, influenced my taxation.

As regards the items objected to by the solicitor on behalf of the defendant, viz.—No. 1. Instructions for bill, amended bill, and affidavit in aid of plaintiff's case, £55 15s. No. 2. Number of counsel employed. No. 3. Fees paid to counsel on briefs for hearing. By a consent order the defendant undertook to pay all costs between solicitor and client, and that the defendant was, if necessary, to furnish a requisition for that purpose; the true construction of this consent is, in my judgment, that the defendant do pay all costs—that is, exonerating the plaintiff from all liability in respect thereto. In this view I am confirmed by the production

Chancery Tax-
ing Master's
Office.
1875.

before me of the certificate of the plaintiff's senior and junior counsel, settled in consultation—settled at a meeting of the counsel at both sides—to the effect that the defendant was to bear all costs as before stated. The consent by which the suit was compromised is peculiar in its wording—the language is not confined to mere solicitor-and-client costs, it gives the plaintiff all her costs incurred.

Now, the first item objected to is the instructions on the bill, the amended bill, and the affidavits in aid of the plaintiff's case, amounting altogether to £55 15s. This sum must be dealt with, having regard to the observations in the schedule of fees, "whereby the Taxing Master is to be at liberty to take into consideration the special circumstances of each case, and, at his discretion, to make such allowances for work, labour, and expenses, properly performed and incurred in and about the preparation of the bill or answer, examination, and affidavit, as shall appear to him to be just, having regard to the length of the documents, the nature of the suit, the interests of the parties, and the fund or person from which, or by whom, the costs are to be paid."

Having in view, therefore, this wide discretion conferred upon me as Taxing Master, the work and labour performed by the solicitors for the plaintiff in the preparation of the pleadings, and the trouble bestowed on the arrangement of the briefs, and also considering the large amount of property at stake—some thousands of pounds—I felt and thought that, in the exercise of this discretion so vested in me, the sum so charged for instructions to be moderate; and if even that sum were charged as between party and party I should have come to the same conclusion, because I have come to the conclusion, from considerable practice myself and some years' official experience, that in an equity suit there is hardly any difference, and I think it is wise it should be so between party-and-party costs and between solicitor-and-client costs, the exception merely being any costs incurred *ex abundante cautela*, or expenses incurred which would be of no use at the hearing—items rendered necessary by reason of the negligence or incapacity of the solicitors. With these exceptions, in a well-prepared bill of costs between party and party, and solicitor and client, there ought to exist little, if any, appreciable difference.

The next item of objection is a retaining fee of £10 10s. to Mr. Macdonogh, the senior and leading counsel for the plaintiff. It is urged by the defendant that he should not be obliged to pay this, or, at least, the whole of it. If I be right in my construction of the consent order I cannot yield to the objection. It is urged that the plaintiff personally knew nothing of the leading counsel, and that it was the act of her solicitor. I believe that to be so; but I think this lady's professional advisers were bound to point out to her, if they considered it a prudent course, to select a gentleman of eminence at the Common Law Bar to conduct so critical a case, looking at the probable course the suit would take, and that the Equity Judge would, in all probability, be likely, during the hearing of the cause, to require the assistance of a jury to decide upon alleged matters of fact, a large number of which were raised and in dispute between the parties; and, acting on the advice of her solicitors, the fee of £10 10s. was paid. Therefore, as money paid by her authority and with her assent, the fee is, in my opinion, properly chargeable as solicitor-and-client costs, and payable by the defendant.

*Chancery Tax-
ing Master's
Office.
1875.*

Next are the numerous consultations objected items. During the settlement and arrangement of the pleadings and the affidavits, these consultations were undoubtedly numerous, but it must be borne in mind that the answers and affidavits filed by the defendant, all of which I was obliged to carefully go through, provoked and necessitated many of these consultations; and as each and all of them were certified by counsel as having been required in the interests of the plaintiff, I have no hesitation in expressing my opinion that the solicitors were bound to carry out the direction of counsel, and that all these consultations must of necessity be allowed, and more particularly as the defendant derives, under the terms of the consent order, a substantial advantage out of the property in dispute, and these costs will come out of the general fund, but I do not lay overmuch stress on this last consideration; the solicitor must procure the certificate of senior counsel as to the propriety or necessity of a consultation to enable him to charge therefor, and has a right to rely upon that certificate as a justification for the same.

Before arriving at the result I have now announced, I perused

*Chancery Tax-
ing Master's
Office.
1875.
Ante, p. 108.*

with care the English decisions, *Hill v. Peel* (the Tamworth Case), *Pegler v. Gurney* (the Southampton Case) (1); also the Irish Case, *Galway Election Petition* (2); and, although these cases refer to English and Irish Election Petitions taxable under the Chancery schedule of fees, numerous Chancery cases taxed between party and party, and solicitor and client, were referred to and considered. The decisions arrived at are in conformity with my rulings in the present case. It is, I think, worthy of note that, in considering and discussing the principles upon which these taxations were made, Bovill, C.J., and Mr. Justice Brett had requested the assistance of the senior Taxing Master of the Court of Chancery (England), who was invited to sit with them, and their opinion was that the principle I am acting upon was correct. Therefore, in deciding against the defendant upon these objected items, I consider that I have, in addition to the practice of my own Court, the sanction of the high authority of these learned judges, and the concurrence of the English Taxing Master. I adjudge, accordingly, the allowances made are just and reasonable.

I may observe, too, that it is a remarkable circumstance that, in this particular bill of costs, there is—and necessarily so—a large expenditure and a great outlay, while the actual profit to the solicitor is under £400; therefore, this circumstance, in itself, convinces me that the solicitor's charges are reasonable, being satisfied that all the consultations should be allowed in this special case; and having regard to the 12th General Order of May, 1868, where costs are even taxable between party and party:—"The Taxing Master may allow to the party entitled to receive such costs all just and reasonable expenses as appear to have been properly incurred in:—1. Advising with counsel on the pleadings and other proceedings. 2. Procuring counsel to settle and sign pleadings and such petitions as may appear to be proper to have been settled by counsel. 3. Procuring consultations of counsel. 4. Procuring evidence by deposition or affidavit, and the attendance of witnesses, and supplying counsel with copies or extracts from necessary documents. But in allowing such costs, the Taxing Master should not allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice or

(1) L. R. 5 C. P. 172 (33 Vict., 1869-70).

(2) 7 Ir. L. T. R. 189.

for defending his rights, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.”

Chancery Taxing Master's Office.
1875.

Under all the circumstances, and by virtue of the discretion left to the Taxing Master under the General Order referred to, many of the numerous consultations charged for from time to time, when different points and phases of the suit developed themselves partly by the answer of the defendant and the affidavits filed on his behalf, I do not think I can, as between solicitor and client, disallow any of them; and, in conclusion, rule that all the charges objected to, including the fees of counsel—which in my mind are reasonable, seeing the magnitude of the briefs, and that the fees to counsel, as a general rule, are left to the discretion of the Taxing Master in Chancery as well as at Common Law—must be allowed.

Solicitor for the plaintiff: *Finallater & Co.*

Solicitor for the defendant: *Henry C. Neilson.*

DYOTT v. READE.

(*By permission, from 10 Ir. L. T. R. 110.*)

Rolls.
1875.

Dec. 3, 4.

1876.
March 8.

Practice—Taxation of costs between party and party—Fees to counsel—Case to advise proofs—Fees on hearing of the cause—Refresher fees—Consultation fees—12 G. O., 1868.

Where—in a suit of great magnitude and complexity to set aside a deed as fraudulent and void—fees of fifteen guineas on a case for direction of proofs, fifty guineas on the briefs for the hearing, and ten guineas a day refreshers, were paid to senior counsel for the plaintiff; and it appeared that the fee paid on the case for proofs was fairly required by the magnitude and complication of the cause, but that the fees of fifty guineas and ten guineas respectively were paid by the solicitor rather as special fees, in order to secure the services of particular senior counsel, than as the result of his own estimate of what would be adequate and required by the difficulties and nature of the case:—

Held, that, on taxation between party and party, the fee of fifteen guineas on the case for proofs should be allowed; but, that the fees of fifty guineas and ten guineas should be reduced, and had been properly reduced by the Taxing Master to twenty-five guineas and five guineas respectively.

Rolls.
1875.

On a taxation of costs each item should be separately dealt with ; and so, in estimating the amount to be allowed as a fee to counsel for direction of proofs, the Taxing Master should not take into consideration the amount allowed for settling and revising the plaintiff's bill in the cause, nor the fee paid on a consultation required on advice of proofs—which latter fee, moreover, is not taxable as between party and party.

MOTION, on behalf of the plaintiff, that the Taxing Master should review his taxation. The plaintiff by his bill in this cause prayed that a deed of the 15th of April, 1867, whereby the late Louisa Agar, widow, granted and assigned to Thomas Swan (one of the defendants) large real and personal estates upon certain trusts, should be declared void as having been obtained by fraud and undue influence ; that the said deed might be delivered up to be cancelled ; and that the plaintiff should be declared entitled to the real estate therein comprised as the heir-at-law of the said Louisa Agar, and to the personal estate therein comprised as her administrator. The case was at hearing for nine days, and by the decree of the Master of the Rolls, in conformity with the prayer of the bill, set aside the said deed as fraudulent and void. The bill contained 240 folios, and the interrogatories 100 folios ; the answer of the defendant, George Reade, contained 290 folios, and that of the other defendants 36 folios ; making together 666 folios. The case to advise proofs contained 301 folios, and the manuscript documents referred to therein contained over 1,200 folios. The brief furnished to each of the plaintiff's counsel contained nearly 3,000 folios.

Master Teeling reported as follows, as to the items of the plaintiff's costs taxed between party and party, which it was now sought to have remitted for review :—

“ As to item No. 370—

“ This was a charge of £15 15s., fee to counsel on the case to advise proofs. It will be observed that at item No. 24 in the bill of costs a fee of £10 10s. was charged and allowed to junior counsel for settling the draft bill, and at item No. 27 in the bill of costs a like fee of £10 10s. was charged and allowed to senior counsel for revising the bill, and at items 403, 404, 405, 406, 407, 409, 410, 411, and 412, the sum of £6 6s. was charged and allowed for expense of consultation on advice of proofs. Under the foregoing

circumstances, I consider the fee of £15 15s. (being £5 5s. over the fees paid either to senior or junior counsel for settling and revising the draft bill) to a third counsel was excessive. I, therefore, reduced it by £7 7s., and allowed £8 8s.

Rolls.
1875.

“As to items No. 914 and 918—

“These items consist of fifty guineas each to the two senior counsel on their briefs for hearing. There is no doubt this was a suit of more than ordinary magnitude, and in which I consider large fees should have been allowed. I did, however, look upon fees of fifty guineas as special fees to special counsel (the leaders of the Common Law Bar), and which I considered could only be allowed on taxation of costs as between solicitor and client. Having regard to these facts, I allowed what I considered liberal and fair—namely, twenty-five guineas to each of the senior counsel. I may observe, as bearing out this view, that the fees given to senior counsel were special fees; that the fee paid by the plaintiff to the junior counsel on his brief for the hearing was only £10 10s.; and also, that the fee paid to the Solicitor-General by the defendant on his brief at the hearing was only twenty guineas.

“As to 32 items in reference to refreshers—

“These items were charges of ten guineas refresher fees to the two senior counsel for each day the case was at hearing. I disallowed £5 5s. on each refresher of £10 10s. on the same grounds that I reduced the fees on the briefs.”

Mr. Dames, Q.C. (with him *Mr. Walker*), for the plaintiff, in support of the motion, cited *Galway Election Petition* (1), *Robb* *Ante*, p. 108. and *Reade v. Connor* (2); 12 General Order 1868. *Ante*, p. 135.

Mr. G. Fitzgibbon, Q.C. (with him *Mr. Foley*), for the defendant, *contra*, cited *Stephens v. Lord Newborough* (3), *Smith v. Bullen* (4), *Stanton v. Baring* (5), *Alsop v. Lord Oxford* (6), *Smith v. Earl of Effingham* (7), *Haslam v. O'Connor* (8), *Chapple v. Bourke* (9), *Ante*, p. 99. *Cousens v. Cousens* (10), *Pearce v. Lindsay* (11). *Ante*, p. 18.

(1) 7 Ir. L. T. R. 189.

(2) 9 Ir. L. T. R. 115.

(3) 11 Beav. 403

(4) L. R. 19 Eq. 473.

(5) Weekly Notes 188, Nov. 13th, 1875.

(6) 1 M. & K. 564.

(7) 10 Beav. 378.

(8) Ir. R. 6 Eq. 615.

(9) *Ib.* 3 Eq. 270.

(10) L. R. 7 Ch. App. 48.

(11) 1 De G. F. & J. 573.

Rolls.
1875.
Ante, p. 153.

Mr. Walker, in reply, cited *Smart v. Verdon* (1), *Betts v. Cleaver* (2).

Judgment deferred.

SULLIVAN, M.R. :—

The conduct of the Taxing Master, in respect of the fee to counsel on the case for direction of proofs, is perfectly unwarrantable, and the principle upon which he has reduced it cannot be maintained in this Court. The Taxing Master has now told me that, having regard to the nature of this case and his estimate of what was involved, fifteen guineas was an excessive fee to give to counsel for the advice of proofs. If he had put it on that ground alone, then the question would have arisen whether he had thus sufficient reason for reducing the fees; or whether, when a solicitor, estimating the magnitude of the case, and acting *bonâ fide*, delivers fees which he considers ordinarily commensurate with the magnitude of the case, such fees should not even then be allowed —that was the principle on which I acted in the case of *Robb v. Connor* (3). But the Taxing Master has proceeded to deal with this fee on a principle which would work the greatest mischief, not only to the public, but the solicitors and the Bar. He has taken seven guineas off from fifteen guineas, and reduced the fee on the advice of proofs from fifteen guineas to eight guineas; and the reason why he so acted has been assigned by him in his report, which I will read *verbatim* :—“ This was a charge of £15 15s., fee to counsel on case to advise proofs. It will be observed that at item No. 24 in the bill of costs a fee of £10 10s. was charged and allowed to junior counsel for settling the draft bill, and at item No. 27 in the bill of costs a like fee of £10 10s. was charged and allowed to the senior counsel for revising the bill; and at items 403, 404, 405, 406, 407, 409, 410, 411, and 412 a further sum of £6 6s. was charged and allowed for expenses of a consultation on advice of proofs. Under the foregoing circumstances I considered the £15 15s. (being £5 5s. over the fees paid either to junior or senior counsel for settling and revising the draft bill) to a third counsel was excessive, and therefore reduced it by £7 7s., and

(1) 9 Ir. L. T. & S. J. 589.

(2) L. R. 7 Ch. 515.

(3) 9 Ir. L. T. R. 115.

allowed £8 8s." Now, the principle the Master has acted on is this—that as it costs ten guineas to prepare the bill, and as it costs ten guineas to revise it, and as he has allowed £6 6s. on the consultation, which he thought it was right to allow, and inasmuch as the counsel who had the advice of proofs was not the junior or senior who revised the bill, he must take from that counsel's fee the enormous sum of seven guineas. In this the Taxing Master has overlooked his duty. When a fee is *bonâ fide* paid to counsel it should not be reduced on such grounds as these. Now, this case to advise proofs, in my opinion, must be estimated as if it had been laid before the present Lord Chancellor, who revised the bill, and not before Mr. Macdonogh at all, who was afterwards brought in to advise proofs. I know what was the magnitude of this case; it was before me at hearing nine days; it took me one entire day to state the mere facts; it occupied me the greater part of fourteen nights to write my judgment, so complicated, so unequalled was the extraordinary state of facts on which I thought the plaintiff entitled to relief. Furthermore, the proofs to be given in the case were as critical and involved as it is possible to conceive. I now say from this bench that it is a most astounding fact that less than fifteen guineas was considered a proper fee to advise those proofs, for if it was double that sum it would have been anything but immoderate. I do not make these observations in the interests of the Bar or of solicitors alone, but in the interests of the public, for it may be the fate of any man to have his property at stake in this Court. The documents before counsel were of enormous magnitude; the case involved a great amount of real property—a great amount of personal property; but it involved, above all, the investigation and proof of fraud. The case for advice of proofs, which I have before me, occupied twenty pages of brief. It is totally indefensible, when a document of that description is presented by a solicitor, and all is done and settled on its delivery, that the Taxing Master, in estimating the fee to be allowed for it, should refer back to see what fees he has allowed for the settling and revision of the bill. The drafting of the bill ought to have nothing to say to this item. Each item of taxation should be taxed separately. It is also of great importance that the question of counsel's fees should be settled at the moment of delivery. There

Rolls.
1875.

cannot be a more reprehensible practice than that of marking the fees upon the case in blank. It would furnish an opportunity for any disreputable practitioners to take their chance for fees dependent on the result of the case. When this case to advise proofs was laid before counsel by the solicitor, and he had there and then paid his money and drawn his cheque, it was gone from him for ever. How the propriety of that payment is to be estimated by the fact that two other counsel got twenty guineas between them, surpasses anything I ever came across. I cannot understand why the fair and honest principle which is laid down in the *Galway Election Petition* (1) is not followed—namely, that when a solicitor, acting *bonâ fide*, duly estimates the fee to be paid and delivers it to his counsel, his discretion ought not to be lightly interfered with. And I can only say that, having regard to what came before me in the case of *Robb v. Connor* and to what is now before me, I shall keep a strict watch on this question of the *quantum* of taxation. In my opinion, that fee of fifteen guineas upon the case to advise proofs should have passed criticism, and I shall allow it as a matter of course.

Ante, p. 108.

Ante, p. 135.

With respect to the consultation fees I express no opinion, as they have not been appealed against. But I wish here to say a word on this question of costs between party and party. Costs between party and party are not the same as solicitors' and clients' costs. In costs between party and party one does not get full indemnity for costs incurred against the other. The principle to be considered in relation to party and party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay the costs. You cannot indulge in the "luxury of payment"; a remarkable instance of that occurred in this case, but it was occasioned by way of excessive caution, and the adversary is not to pay for that. When a case is laid before counsel to advise proofs, and he requires the due consultation, that must fall as solicitors' and clients' costs, and not as costs taxable between party and party; and, that being so, where I think the Taxing Master entirely erred in this matter was in thinking that if he had added the fees of consultation to the fees on advice of proofs the fee would have been ex-

cessive—in my opinion, it would be under the mark, rather than otherwise.

Rolls.
1875.

There now remain substantially only two other items in controversy—namely, a fee of fifty guineas paid with the briefs for the hearing to each of the plaintiff's senior counsel, and a daily refresher of ten guineas paid to each of them for the eight days after the first during which the hearing of the case continued. Now, these fees have respectively been reduced by one-half on taxation. The matter might have been decided without difficulty but for the grounds relied on at the bar for maintaining Master Teeling's taxation, one of which was that, according to the present rate of remuneration at the Irish Bar, twenty guineas was the highest standard of fee known to be allowed for senior counsel on his brief, as between party and party; and the other ground was that, in the whole annals of taxation in this country, twenty-five guineas was the highest known, and that was in a very recent case, *Huslam v. O'Connor*. These statements appeared to me at the *Ante*, p. 99. time they were made to be so extraordinary that I could scarcely believe them; and I myself mentioned that, in the case of *Carey v. Cuthbert*, which was lately before me, and which was not a case anything like the present in point of magnitude, twenty-five guineas was given to each of the two senior counsel, and twenty guineas to the junior; and, on taxation, Master Coffey, with great propriety, allowed such fees. But, in order to avoid any mistake, I determined to inquire further as to those statements. Having done so, I must declare that more rash instructions were never given to counsel than those on which these statements were based, for, as the event showed, for neither the one statement nor the other was there any foundation. The statement with regard to "the annals of taxation" was rested before me upon an allegation that had formed, substantially, the ground-work for the decision cutting down the fee to one-half its original amount. Now, it is right to say that the case had scarcely been argued before me when the Taxing Master, seeing some report of it in the daily papers embodying that statement, addressed a letter on the subject to me, dated the 8th December, 1875, at the very moment when I was about to write to him for information about it. [His HONOR read Master Teeling's letter, the purport of which was that no

Rolls.
1875.

Ante, p. 99.

such information as that referred to had ever been afforded or supplied, either by himself or his Registrar; and that the whole foundation for it was that an assistant of Mr. Cusack, the solicitor for the plaintiff, had come to the office and asked to see the bill of costs in the cases of *Croker v. Croker* and *Haslam v. O'Connor*, which was shown to him.]

Now, this whole transaction is an illustration of the care that should be observed before instructing counsel to make general statements of such a character as to a matter largely affecting not only the Bar and solicitors, but the public as suitors. The real question I have to decide here is whether the Master's taxation in this particular case is to be maintained or overruled, and if overruled, to what extent? The case out of which this taxation arose was one of great magnitude, involving altogether a subject-matter which might be set down in round numbers at £40,000. It was a suit to set aside a deed obtained by the defendant from an aged lady, who lived in his house, as fraudulent and void, and executed under such circumstances as that I by my decree had to set it aside with costs against the defendant. The facts spread themselves over a series of years, and a large number of documents were connected with them. The briefs delivered to counsel contained nearly 3,000 folios, and I did not think they were at all too long, and only a very small number of folios were taxed off. The costs of the suit were thus necessarily very heavy. They were originally furnished at £1,181 12s. 5d., of which £339 8s. 3d. were taken off on taxation, leaving a balance of £840 as taxed costs. Three counsel for the plaintiff were rightly allowed on taxation—the two seniors getting each fifty guineas with their briefs, and the junior ten guineas. The case was nine days at hearing, and ten guineas a day were given to each of the seniors as a refresher fee, and two guineas a day to the junior. Now, no question arises upon the junior's refresher fees. I have looked over the taxed bill of costs, and I feel bound to say that, apart from the disputed items, it has been taxed with considerable discrimination and with fair liberality. With regard to the amount of counsel's fees to be allowed on taxation, this Court is generally slow to interfere with the discretion vested by law in the Taxing Master; but if the Taxing Master erred in a matter of principle

this Court would interfere. I have expressed my views on this subject in the recently reported case of *Robb and Reade v. Connor* (1). In the present case the Taxing Master has stated his reasons for the course he has taken—namely, that he looked upon fifty guineas as a special fee, which could only be allowed as between solicitor and client; and this view was supported by the fact that the junior counsel had only received ten guineas on his brief, which was a very unusual disproportion; and the leading counsel for the defendant had only received twenty guineas on his brief, and the junior seventeen guineas. But I feel bound to say that I do not think that the fees paid on one side in a case like this could be taken as a test of what should be allowed on the other. There is almost in all cases considerably more trouble on one side than on the other, and it might happen that one side was dealing with a solicitor who was disposed to act fairly towards the Bar, while the solicitor on the other side might act in a niggardly manner. It is a great mistake to suppose that this is a Bar question. It is nothing of the kind. No matter what rules might be laid down as to taxation of costs, the fees paid to counsel could never be limited by them. This is really a question more affecting solicitors than barristers, but infinitely more than either barristers or solicitors the suitors of the Court and the public are interested in it, and their interests are paramount to those of any profession. It is a perfectly settled rule that an advocate of eminence might decline to go into any given Court under a fee of a given amount, or to go as special counsel without a special fee, but such fees are not necessarily to be allowed in taxation as between party and party, for in the last-mentioned case the fee must be assessed quite irrespective of any rules individual counsel might lay down for themselves. I had not delivered judgment in the case without having spent several days in reading over all the documents in this case; and I doubt whether I have ever been placed in circumstances of greater difficulty owing to the way in which the plaintiff's solicitor dealt with the counsels' fees. If I were asked the abstract question at the time, I would have said without hesitation that fifty guineas was not too large a fee for the plaintiff's senior counsel in this case. But the real point was that which Mr. Foley pressed

Rolls.
1875.
Ante, p. 135.

(1) 9 Ir. L. T. R. 115.

Rolls.
1875.

in his argument with great ability—namely, that it was impossible to suppose that the scale of fees given to senior counsel was formed in Mr. Cusack's mind by a mere estimate of the difficulties of the case, but that these fees were given to secure the services of two particular gentlemen. This view is supported by looking at what had been given to junior counsel, and that is a fair test. He had only received ten guineas, and Mr. Foley asked why that estimate should not be taken as a criterion of the difficulties of the case as well as the fifty guineas. I quite agree in that view after having given the case the greatest consideration, and it received considerable confirmation from the course which had been taken at the original hearing, and which I believe to be without parallel—namely, the plaintiff's solicitor interposing when his junior counsel was about to reply in his ordinary turn, and asking that the case might stand until Mr. Macdonogh should be sent for to reply. I had been obliged to call on the plaintiff's junior counsel to reply according to the ordinary course, and he did reply remarkably well. Under all these circumstances, and having regard to the mode in which the plaintiff's solicitor proportioned his fees, I must decline to interfere with the Taxing Master's ruling. I do not believe that a scene such as I have described could have occurred in Court if there had not been some special circumstances under which the fees of fifty guineas, or, at any rate, one of them, was given, which view was confirmed by the refreshers of ten guineas a day—an unusual amount in this country. I consider myself debarred by the course Mr. Cusack has taken from allowing those fees, and from entering into the general question whether the fees of fifty guineas should have been allowed. Mr. Cusack must abide by what he has done. The refresher fees of five guineas a day allowed to the senior counsel by the Taxing Master seem fair; and, therefore the ruling of the Master both as to the two fifty guinea fees and the refresher fees must be affirmed—each party to abide their own costs.

Order accordingly.

Solicitor for the plaintiff: *T. A. Cusack.*

Solicitors for the defendant: *L. W. Corcoran & Son.*

O'HALLORAN v. GARVEY AND OTHERS.

Exchequer,
1876.

(By permission from I. R. 9 C. L. 551; s. c. 10 Ir. L. T. R. 20.)

Jan. 11, 18.

Judgment by Default—Certificate to entitle the Plaintiff to full Costs—Common Law Procedure Act, 1853, ss. 126, 243—Common Law Procedure Act, 1856, s. 97.

1. Although judgment has passed by default, the Court has jurisdiction to grant the plaintiff a certificate under section 97 of the Common Law Procedure Act, 1856.

2. Where there has been no trial, the Court has no jurisdiction to grant the plaintiff a certificate either under section 126 or section 243 of the Common Law Procedure Act, 1853; whether the plaintiff is entitled to either certificate is a matter to be determined by the Taxing Master, as incident to the taxation of costs.

Hickey v. O'Connor (1), dissented from.

Ante, p. 133.

MOTION for certificates under sections 126 and 243 of the Common Law Procedure Act, 1853, and section 97 of the Common Law Procedure Act, 1856, to enable the plaintiff to obtain his full costs of the action—viz., certificates that the freehold or title of the land mentioned in the plaint was chiefly in question, or that the trespass was voluntary or malicious; that the action was brought to try a right more extensive than the sum sued for; that the case was one which could not have been tried in the Civil Bill Court, or was a fit case to be tried in a Superior Court.

Trespass, q. c. f.—The plaint contained two counts complaining of trespasses by the defendants on the lands of Ballycunneen, in the County of Clare on two several occasions, and was served on the defendants on the 25th of June, 1875, the venue being laid in the County of the City of Cork. No defence was taken to the action by any of the defendants, and interlocutory judgment was entered on the 12th of July, and a writ of inquiry, directed to the Sheriff of the City of Cork, to ascertain the amount of damages, came on to be heard before the Sheriff on the 3rd of August, 1875. None of the defendants appeared at the inquiry, although served with notice of it, and the jury assessed the damages at sixpence.

The plaintiff made an affidavit in support of the motion, in which he stated that the defendants committed the trespasses complained

Exchequer.
1876.

of in the plaint in the assertion of a pretended right of passage which the defendants amongst other persons, inhabitants of the parish of the "Wells," claimed to exercise over the plaintiff's lands in going to and from the R. C. chapel of the "Wells," for the purpose of attending Divine Service on Sundays; that on Sunday the 6th of June, 1875, he met the defendants, and warned them not to persevere in going over the lands to the chapel; yet they afterwards, on the same day, broke and entered the lands, and committed the trespasses complained of in the first count; that on Sunday the 13th of June, 1875, he met the defendants on the public road, as they were about to enter on the lands for the purpose of passing over them to the chapel, and he told them not to come in upon the lands, and that if they did so he would proceed against them and hold them accountable for any costs he might thereby incur; yet they in his presence climbed over the boundary fences of the lands and passed over them to the chapel, thus committing the trespasses in the second count complained of; that the right of passage claimed by the defendants was a right to pass through his demesne, and for that purpose to use the principal avenue and entrance gate leading to his residence, and that the right of property which the action had been brought to try was of much greater value to him than the sum of five pounds; that the value of the lands, under the Acts relating to the valuation of rateable property in Ireland, greatly exceeded twenty pounds by the year; that he had suffered very great annoyance and injury from the persistent use of the pretended right of passage over his lands by the defendants and others, and he had been forced to take legal proceedings against them in order to preserve his property from destruction, and that the pretended right of passage had been used as an excuse for trespassing in other directions and for other purposes over his demesne, and that on several occasions his trees had been broken and damaged, fences thrown down, gates left open, and cattle allowed to stray from his lands by persons claiming a right of passage to the "Wells" chapel.

Two of the defendants made an affidavit to resist the motion, in which they stated that about four days after the service of the plaint all the defendants went to the residence of the plaintiff, and he said that if they agreed not to go upon the lands he would with-

Exchequer.
1876.

draw the law proceedings; that they agreed to do so, and had not since gone upon the lands, nor had the other defendants, as they verily believed; that in consequence of the foregoing conversation they did not enter a defence to the action, nor consult any attorney upon the subject, though they now charged and believed that they had a good defence to the action, inasmuch as the public had an uninterrupted right of way to the lands as long as they could remember—for more than 30 years; and they heard no more of the law until they received a notice that an inquiry would be sped before the Sheriff of the City of Cork; that the judgment was obtained against the defendants by stealth, and behind their backs, and after the plaintiff had agreed not to proceed in the cause; and they charged that if the plaintiff had not agreed with them to withdraw the proceedings, they would have consulted an attorney, and would have entered a defence to the action, having, as they were advised and believed a good defence; but that when such an offer was made by the plaintiff, they, not desiring to go to law, and in order to avoid any dispute or difference, agreed not to go on the lands again.

The plaintiff made an answering affidavit, in which he denied the statements in the defendants' affidavit; and one Mathias MacMahon made an affidavit denying the statements referring to him in the defendants' affidavit.

O'Brien, Q.C., and *Thomas Kelly*, for the plaintiff, in support of the motion:—

Hickey v. O'Connor (1) is a direct authority for making the *Ante*, p. 133. application to the Court in the first instance. In the case of judgment by default, sections 126 and 243 of the Common Law Procedure Act of 1853 do not apply at all. The precise point is decided in *M'Alister v. Callan* (2), which is followed in *Bennett v. Scott* (3); *Brennan v. Mahony* (4); Buller's Nisi Prius, 329a.

Atkinson, contra:—

The Court has only power to grant a certificate under section 97 of the Act of 1856, *Caldwell v. Johnston* (5) is an authority to

(1) Ir. R. 8 C. L. 509.

(4) H. & J. 478.

(2) 8 Ir. C. L. R. App. 10.

(5) Ir. R. 6 C. L. 297.

(3) 8 Ir. Jur. N. S. 206.

Exchequer,
1876.

Ante, p. 133.

show that *M'Alister v. Callan* (1) is of no weight. In *Bennett v. Scott* (2) *M Alister v. Callan* is not followed to the extent of giving a certificate under the 243rd section. The plaintiff ought to have gone before the Taxing Master. In *Bennett v. Scott* (2) it was distinctly recognised that where a plaintiff wants to proceed under the 243rd section of the Common Law Procedure Act of 1853 he must go before the Taxing Master. The 126th section gives no jurisdiction to the Court, and only gives jurisdiction to the Judge: *Hickey v. O'Connor* did not come under section 126. *Hickman v. Colley* (3); *Claridge v. Smith* (4); *Bewley and Naish*, 144.

The judgment of the Court (PALLES, C.B., FITZGERALD, and DOWSE, B.B.) was delivered by PALLES, C.B.:—

This is an application for three certificates for costs, under the 126th and 243rd sections of the Common Law Procedure Act, 1853, and the 97th section of the Common Law Procedure Act, 1856. From the view which we take of the case, we shall deal separately with each certificate.

In reference to the application under the Act of 1856, the 97th section of that Act expressly confers upon us a jurisdiction to make an order to the effect of a certificate in the event, which has happened, of there being no trial. The certificate required is—either that the case was one which could not have been tried in the Civil Bill Court, or that, though within the jurisdiction of the Civil Bill Court, it nevertheless was a fit case to be tried in one of the Superior Courts. It was proved by the affidavit on behalf of the plaintiff, that the action was brought to try an alleged right of way claimed by the defendants, and the statement was confirmed by the affidavits of the defendants in opposition to the motion. It was also shown that the amount of the valuation of the property excluded the jurisdiction of the Civil Bill Court under the 37 & 38 Vic. c. 66. The case, therefore, was one which could not have been tried in the Civil Bill Court, and we shall make an order to that effect.

The application for a certificate under the 243rd section of the

(1) 8 Ir. C. L. R. App. 10.

(2) 8 Ir. Jur. N. S. 206.

(3) 2 Str. R. 1120.

(4) 4 Dowl. 583.

Common Law Procedure Act, 1853, raises a different question. This section does not prescribe the mode in which the purpose for which the action has been brought shall be ascertained. The Act, no doubt, provides for general rules being made, and the rules are to be construed as part of the Act. The 103rd rule makes provision for the determination of the plaintiff's right to full costs in the event of a trial; but no provision is made, either by the statute or by the rules, for the determination of this question in the event of there being no trial. The old practice was that matters of fact which affected the plaintiff's right to costs were, in the absence of legislative enactment to the contrary, put upon the record by suggestion, which was traversable, *Rex v. Poland* (1); *Hickman v. Colley* (2). But this rule was never applicable when the alteration in respect of costs was one which merely increased or diminished the amount. In such a case the question was one of taxation, which was determined by the officer, *Brooker v. Cooper* (3). The 243rd section affects not the right to costs, but their amount. If, therefore, the matter were *res nova* it would appear to us that the purpose for which the action was brought should, in the event of there being no trial, be, *prima facie*, determined by the Taxing Master as incident to the taxation of the costs.

It has, however, been argued that we are not at liberty to deal with the question as if it were *res nova*; and *Hickey v. O'Connor* *Ante*, p. 133. (4) has been referred to as a decision of the Court of Common Pleas upon the point in question. But there is another case in the same Court which underwent very full consideration, *Bennett v. Scott* (5), which is an authority the other way. In that case which, in relation to this question, was decided upon the assumption of no trial having been had, the question of the plaintiff's right to full or half costs under the 243rd section was raised and decided upon a motion for the review of the taxation. We think that, in the exercise of the jurisdiction conferred on us by particular statutes, we should be careful to see that the case in which we are called upon to act is within the jurisdiction; and, with deference to the decision in *Hickey v. O'Connor*, we are of opinion *Ante*, p. 133.

(1) 1 Str. R. 49.

(2) 2 Str. R. 11.

(3) 3 Exch. 112.

(4) Ir. R. 8 C. L. 509.

(5) 8 Ir. Jur. N. S. 206.

Exchequer.
1876.

that, in a case such as the present, the question under the 243rd section can arise solely upon the appeal from the decision of the Taxing Master.

As to the third certificate—viz., that under the 126th section, we also hold that we have no jurisdiction to grant it. The plaintiff's counsel, in moving the application, contended that this certificate was unnecessary to entitle the plaintiff to costs. We are far from saying that he is wrong in this contention. Our decision is, that we have no jurisdiction to grant it.

We shall, therefore, make an order under the 97th section of the Act of 1856, declaring that the case was one which could not have been tried in the Civil Bill Court; and we say "no rule" upon the rest of the motion.

Order accordingly.

Attorney for the plaintiff: *James Hynes.*

Attorneys for the defendant: *Connolly and Leahy.*

Exchequer.
1876.

ALLEN v. O'CALLAGHAN.

(By permission, from 10 Ir. L. T. R. 131.)

Jan. 12, 20.

(Before PALLES, C.B., FITZGERALD, DEASY, and DOWSE, BB.)

Ejectment for Non-payment of Rent—Setting aside Proceedings—Abuse of the Process of the Court—Action brought after Rent Tendered—23 & 24 Vic., c. 144, s. 62—Costs—Letters before Writ.

A tender of rent after the gale day is not a defence to an action of ejectment for non-payment of rent.

The 5th section of 11 Anne, ch. 2—providing that if a tenant should, at any time before the trial of an action of ejectment for non-payment of rent, pay or tender the rent and costs all further proceedings should cease—having been repealed by 23 & 24 Vic., c. 154, the tenant, instead of so tendering rent due, should proceed as provided by section 62 of the latter Act.

Where a tenant had tendered rent *post diem* the Court refused to stay or set aside the proceedings in an action of ejectment subsequently brought for non-payment of the rent, the right to tender having ceased to exist at the time when it was made.

Semble, that an attorney of a creditor retained to demand a debt has no right to insist on payment of any costs of his letter demanding the debt previously to issuing a writ of summons and plaint.

MOTION, on behalf of the defendant, in two actions of ejectment for non-payment of rent, that the writs of summons and plaint be set aside as vexatious and an abuse of the process of the Court, inasmuch as the actions had been instituted after the rent—on account of the non-payment of which they were brought—had been tendered to the agent of the plaintiff.

Exchequer.
1876.

The following were the material facts:—The defendant held the three houses and premises in question under three separate leases as tenant to the plaintiff at the respective yearly rent of £10, £18, and £20, making altogether £48 a year, for which he was in the habit of settling by one payment, and of getting one receipt for the several rents. It was customary for many years, as the defendant alleged, for the landlord not to call upon the tenant to pay a gale until another was about to fall due. In September and again in October, 1875, Captain Bradley, who had recently become the plaintiff's agent, applied to the defendant for the March rent, when he asked for a little further time. On the 25th October the defendant received a letter from Mr. Bass, the plaintiff's attorney, applying for a year's rent to September, and he called upon Mr. Bass the next day and tendered a cheque for £22 1s. 6d. in payment of the March rent, after making deductions for poor rate and water rate. Mr. Bass declined to accept it without communicating with Captain Bradley; and Captain Bradley having refused to take less than a full year's rent, Mr. Bass wrote, on the 16th November, to the defendant, stating this. The defendant at once called on Mr. Bass, and stated he would pay the amount on the following Saturday; and, accordingly, on the 20th November he called again, and handed Mr. Bass his cheque of that date for £44 3s., being one year's rent, less £3 6s. deducted for poor's rate and 11s. for water rate. The cheque was payable to the order of Captain Bradley, and Mr. Bass retained it until he saw him, which was on the 2nd December. Captain Bradley then directed Mr. Bass to return the cheque, on the ground that the deductions claimed were excessive, giving reasons for this contention which are not material to be stated. Mr. Bass, accordingly, returned the cheque to the defendant in a letter of the 2nd December. The defendant admitted, in his affidavit, that the deductions were slightly erroneous

Eschequer.
1876.

in their details, but alleged that the cheque was for an amount more than sufficient in any view of his liability.

On the 3rd December the defendant, having previously paid the rates for September, 1875, called at the office of Mr. Bass and, as Mr. Bass was not there, tendered to a clerk, as the defendant alleged, the sum of £44 1s. 2d. in cash, together with the proper vouchers for £3 7s. 10d. poor's rate and 11s. water rates, which he alleged he was entitled to deduct. The clerk refused to receive the money in the absence of Mr. Bass, whereupon the defendant left the vouchers with him, and directed him to tell Mr. Bass that he had tendered £44 1s. 2d., with vouchers, and that he would pay it if sent a receipt for the year's rent. The clerk made an affidavit denying that any tender whatever had been made, and two other clerks, who had been in the office at the time, made a joint affidavit corroborating him. On the 4th December a messenger from Mr. Bass brought defendant a receipt, in the usual form, for a year's rent up to the 29th September, 1875, signed by the agent, allowing him for poor's rate, but accompanied by a demand for 10s. 6d. for costs, which the defendant refused to pay. Thereupon, the plaintiff, on the 9th of December, 1875, issued two summons and complaints in ejectment for non-payment of rent to recover possession. The defendant alleged that the vouchers had been detained by Mr. Bass as payment for so much of the rent, and he lodged in Court £44 1s. 2d., the amount that he alleged he had tendered before service of the complaints. He, also, positively swore that all rent was paid for the three houses up to the 29th September, 1874, and stated that he believed the proceedings were instituted because he refused to pay the 10s. 6d. to Mr. Bass. Mr. Bass made an affidavit, in which he endeavoured to show that the deduction sought to be made by the defendant in respect to the water rate was not such as he was entitled to, and that the sum properly due for rent was £44 12s. 2d., which sum the defendant had never offered to pay either by cheque or by cash. The defendant, in his answering affidavit, stated that Mr. Bass, in his letter of the 2nd December, made the amount payable for rent £45 7s., but that, in addition, the sum of 10s. 6d. costs was added by him, which, the letter stated, "must also be included, making together the sum of £45 17s. 6d." The de-

defendant further stated that the sum of 11s. for water rate had been properly deducted by him, that it was, in fact, allowed in the receipt for rent brought to him on the 4th December by the messenger from Mr. Bass, the only sum then in dispute being the sum of 10s. 6d. claimed for costs by Mr. Bass; that no objection was ever made to allowing poor's rate or water rates until after the ejectments had been brought; that, in addition to his tender, he had, both before and after the service of the ejectments, offered to pay the year's rent, without costs, to Mr. Bass; and that he was informed, and believed, that his attorney, immediately after the service of the plaints, offered to pay the rent, without costs, to Mr. Bass, but that Mr. Bass, in every instance, refused to accept it unless his costs were also paid.

O'Brien, Q.C. (with him *T. Wall*), for the defendant, in support of the motion:—

The Landlord and Tenant (Ireland) Act, 1860, section 62, clearly has reference only to a case where the action has been already brought. In the case of *Goodright* (deceased, *Stevenson*) v. *Noright* (1), it was held that a tender of rent before service of the ejectment process shall stay proceedings. This is really an effort to enforce the payment of 10s. 6d., costs of the attorney's letter demanding the rent, a claim which is not legal—

[*PALLES, C.B.*:—I believe it is not the custom for an attorney to demand costs before a writ is issued at all.]

Certainly not. The attorney's own client is the person to pay him. If the debt is paid before action brought the attorney is not entitled to recover the costs of his application for the debt from the debtor: *Caine v. Coulson* (2). There can be no question on the point as to the deduction of the poor rate, as the defendant had sub-let the premises in apartments: 6 & 7 Vic., c. 92, s. 4.

Wm. Johnson, Q.C. (with him *Lane*), *contra*:—

The rent was not, in point of fact, ever tendered. But a plea of tender to an action of ejectment for non-payment of rent is bad in point of law. The proper course is for the defendant to lodge the amount of the rent in Court, which he is enabled to do by

(1) 2 W. Bl. 745.

(2) 32 L. J. Ex. 97.

Exchequer.
1876.

reason of the provisions of the Landlord and Tenant (Ireland) Act, 1860, section 62, and he can plead accordingly, and show the rent is paid by lodgment of money in Court, under the Common Law Procedure Act, 1853, section 198. In *Lessee of Geoghegan v. Gardiner* (1), a plea of tender of rent was held an insufficient answer to an action of ejectment for non-payment of rent (*see* "Longfield on Ejectment," p. 328). No abuse of the process of the Court was attempted. It is an invariable practice for attorneys to claim their costs, as was done here; and it would be a hard thing if a creditor who was kept out of his money should be obliged to pay his attorney for trying to get it.

[DOWSE, B.:—Suppose an attorney writes a letter to a debtor, asking him to pay an account claimed to be due, can he also make the debtor pay the costs of that letter?]

In that case the debtor might, perhaps, put him at arm's length, but the custom has been to pay the costs (2).

[PALLES, C.B.:—If these costs cannot legally be demanded, it becomes a serious question whether attorneys who are the officers of the Court should continue habitually to make a demand for a sum of money that the Court has decided could not be demanded. If there was a solemn decision of the Court that these sums were not a legal demand, the officers of the Court should follow that decision, and not be asking persons, who are not aware of how the law stands, to pay this demand for the costs of letters sent before action brought.]

[DOWSE, B.:—I agree entirely with my Lord Chief Baron. I have continually seen instances mentioned in the newspapers of poor people, debtors and others, having demands for 10s. and 15s. made upon them in this way, and paying those demands rather than be dragged into law. If the demand is not legal, the attorney should not be allowed to levy what he might consider "benevolence" from those parties.]

There are cases in which it has been held that the demand is a

(1) Hay. & J. App. xvi.

(2) As to the duty of an attorney to write demanding payment before action see *Rinder v. Deacon* (11 Ir. Jur. N. S. 414). And note that, on the question as to the costs of such letters, *Holmar v. Stevens* quoted from *The Jurist* by Palles, C.B., *infra*, is much more fully reported, 33 L. T. R. 148, and see article by the writer, on "The Costs of Attorneys' Letters" (10 Ir. L. T. & S. J. 474—E. N. B., *Ed.*).

proper one: *Morrison v. Summers* (1); *Capel v. Staines* (2). No doubt, however, the contrary appears also to have been decided (3). *Eschequer.*
1876.

[DOWSE, B.:—It should be understood that attorneys have no right to make this demand for costs when merely applying for payment of a debt.]

[PALLES, C.B.:—Costs are recoverable by an attorney only after the issuing of the writ.]

We do not argue that the practice is a legal one, but it is customary for the attorney almost always to apply for costs when applying for payment of the debt. In this case, however, the right to tender at all had ceased to exist, and it was no abuse of the process of the Court to issue the writs, ignoring a tender which the plaintiff was not bound to recognise.

Judgment reserved.

PALLES, C.B.:—In these cases, which are two separate ejectments for non-payment of rent, motions have been made that the proceedings may be stayed, or set aside with costs, as oppressive and vexatious, and an abuse of the process of the Court. The subject-matter of the dispute, which has culminated in these applications, was originally a very small amount. It appears that the defendant held three separate tenements from the plaintiff under leases. His usual practice was, to pay one gale before the next accrued due. The gale which accrued on 25th March last was not so paid, and the year's rent was due upon the 29th September. For this year's rent there appear to have been some applications, which were not complied with; and on the 26th October the defendant sent a cheque for the March gale, less by a reduction for some rates which had been previously allowed, and for which he was not then entitled to credit. Ultimately, and before the actions were brought, a tender was made by the defendant to the plaintiff's attorney of a sum of money which one party alleges, and the other denies, to be the year's rent, less the deductions to which the tenant was entitled. This tender was refused. The demand in consequence of which the tender was made, included the sum of 10s. 6d. for costs; and there can be

(1) 1 D. P. C. 325, 1 B. & A. 559. (2) 5 D. P. C. 770, 2 M. & W. 853.

(3) Fisher's C. L. Dig., 2093, Ed. 1870.

Exchequer.
1876.

little doubt that if the demand for the 10s. 6d. had been complied with, we should not have been troubled with these warmly contested motions. Whilst, however, we may regret the non-existence of a *nodus vindice dignus* we are bound to decide the question raised.

The mode in which the defendant's case was presented to us was that the tender was a legal answer to the claim for rent due; that the adoption by the plaintiff for the recovery of that rent, of the particular form of action of ejectment, prevented him availing himself by plea of this defence; and, therefore, he argued the Court would interpose upon an interlocutory application. During the argument it was suggested by the Court that, in an action of debt or covenant for recovery of the rent, the tender made in the present case could not, even assuming it to have been sufficient in amount, have been pleaded as a valid defence; and ultimately it was admitted by the defendant's counsel, as indeed is clear, that such a plea could not be maintained. Where a debt is payable on a particular day, the debtor is bound to tender on the precise day, and cannot plead a tender made *post diem*. Thus, the grounds upon which the application was first rested admittedly failed; and, in truth, the application, as now presented to us, is to obtain on motion the benefit of a tender in a case in which, according to law, the right to tender had ceased to exist. In support of the application the case of *Goodright* (on the demise of *Stevenson*) v. *Noright* (1) was cited. That case, it will be found, turned upon the language of the English Act, 4 George II., cap. 28, sec. 4, which was similar in its terms to—indeed, probably copied from—our statute of 11 Anne, chap. 2, sec. 5. That section enacted that if the tenant should at any time, before the trial in such ejectment, *pay or tender* the lessor all the rent and arrears, together with the costs, all further proceedings should cease. The decision was that a tender, before notice of action brought, was sufficient. At present there is no corresponding enactment in force in this country. The 5th section of the 11 Anne, chap. 2, has been repealed by the 23 & 24 Vict., chap. 154. The 62nd section of that Act, whilst it provides for paying into Court a sum of money for rent, at any time before judgment, or service of notice of trial,

(1 Sir W. Blackstone, 746.

in an ejectment for non-payment of rent, makes no provision for tender before action. The case cited is, therefore, inapplicable.

Exchequer.
1876.

There is a case which was not cited, *Holman v. Stevens* (1), which, though not a case of ejectment, is more closely in point. We have carefully considered the ground upon which that decision was rested, and their applicability to the present case. Notwithstanding, however, the expressions of Mr. Justice Willes, we are unable to arrive at the conclusion that we can set aside a writ as being an abuse of the process of the Court upon the sole ground that a tender was refused in a case in which the right to tender had ceased to exist. To do so would be in effect to force the creditor to accept a tender in a case in which, according to law, he was not bound to do so. We feel that, if this shall operate as a hardship, the remedy rests with the Legislature, not with the Court. We have, therefore, arrived at the conclusion that, even if we adopt the view of the facts presented by Mr. O'Brien, we cannot yield to the application; and that the only course open to defendant is to lodge the rent in Court under the 62nd section of the 23 & 24 Vict., cap. 154. We refuse the application, but without costs.

FITZGERALD, DEASY and DOWSE, BB., concurred.

Motion refused.

Attorneys: *Buss & Son* and *M. J. Horgan*.

SEALEY v. STAWELL.

(By permission from 1 R. 10 Eq 206.)

Y. C. Court.
1876.

April 26.

Practice—Costs—Several Defendants—Use of word “respectively” in Decree awarding Costs to Defendants.

It is not the practice, except under special circumstances, to insert the word “respectively” in decrees giving costs to several defendants; and, as an ordinary rule, the propriety of several defendants appearing separately should be left open for inquiry upon taxation.

Semble—The insertion of “respectively” in a decree after the names of several defendants to whom costs are awarded renders it obligatory on the taxing officer to tax their costs separately.

V. C. Court.
1876.

Mr. Campion, Q.C., on behalf of respondent, George Stawell, the younger, moved, on consent, that his costs under the decretal order (1) should be taxed separately.

Mr. J. Clarke Lane for the petitioners.

The VICE-CHANCELLOR made the order pursuant to the consent. His Lordship said that it was never the practice of the Court, except under special circumstances, to insert the word "respectively" in decrees giving costs to defendants who appeared separately, because it was ordinarily the proper function of the Taxing Officer to investigate whether the separate appearances were vexatious or not. He had been furnished with a report by Mr. Ferguson, the senior Registrar of the Court, as to the practice, referring to a case which had come before the Court of Appeal in Chancery, in which it was held that where one set of costs only were to be allowed, the form of decree in 1 "Seton on Decrees, 243, should be adopted" (2).

Solicitors for the petitioners: *Messrs. Noblett & Son.*

Solicitor for George Stawell, the younger: *Mr. Babington.*

(1) I. R. 9 Eq. 508.

(2) The following is the communication referred to :—"In *Anderson v. Lamb*, 28th May, 1873, on appeal from the Master of the Rolls, the order ran dismissing the bill, with costs to be paid by the plaintiff to the defendants A. B., C. D., E. F., and G. H., his wife. Master Coffey taxed the costs of A. B., but refused to tax those of C. D., E. F., and G. H. I was asked to amend the order by adding the word 'respectively,' and I declined to do so, and an application was made to the Court of Appeal on the 10th of February, 1874, to direct him to tax, and the order made was, "That the Taxing Master do proceed to tax the costs of the defendants C. D., E. F., and G. H., pursuant to the order of this Court, dated the 28th May, 1873.' The Court proceeded on the ground that where one set of costs only was intended to be given the form in 1 Seton, 243, would be used. There a note of a case, *Elliott v. Kempster*, 22nd May, 1864, before Smith, M.R., where he held that an order directing costs to be paid to C. D. and E. F. *respectively* had the effect of precluding the Taxing Master from considering what otherwise it would have been his duty to consider—viz., whether, if they appeared by the same solicitor, and filed separate answers, and appeared by separate counsel at the hearing, they should have separate costs, or one set of costs in the ordinary course ; and the adoption of the word 'respectively' proved to be mischievous. It is never used in the Court of Chancery in London, unless for some special purpose."

In re THE ARMAGH ELECTION PETITION: RIGGS v. BERESFORD.

Com. Pleas.
1876.

June 14.

(By permission, from 10 Ir. L. T. R. 178.)

(Before MORRIS, C.J., KEOGH and LAWSON, JJ.)

Parliamentary Election Petition—Taxation of Costs—Fees to Counsel—Printing Analysis of Bill of Particulars—Expenses of Witnesses.

The Master of the Court, in taxing the bill of costs of an ordinary election parliamentary petition, reduced—1st. Counsel's fees on a motion for particulars, from five, four, and three guineas, to three, three, and two guineas. 2nd. The fee to senior counsel from two hundred to one hundred guineas on his brief at the hearing. 3rd. The fee to junior counsel from sixty to fifty guineas. 4th. The refreshers of senior counsel from twenty to fifteen guineas. 5th. The refreshers of junior counsel from twelve to six guineas. 6th. The fees for eight consultations to four. 7th. The consultation fees from five, five, and three guineas, to three, three, and two guineas. 8th. He disallowed the expenses of the printing of an analysis of a bill of particulars. 9th. Disallowed £38 17s. 6d. out of £117 12s. incurred by the preliminary examination of witnesses. 10th. Disallowed £214 out of £333 10s., the expenses paid to witnesses, only one shilling, *viaticum* being allowed to witnesses resident in town. 11th. Disallowed various charges and fees on subpoenas. 12th. Disallowed the payments made to assistants for taking evidence.

The Court on appeal referred the bill of costs back to the Master to reconsider the refresher fees allowed to junior counsel, and to allow the item for printing, and the expenses of summoning any witnesses mentioned in the bill of particulars; also, the necessary expenses of the examination and attendance of such witnesses as had been summoned and attended, to such amount as he should see fit; but refused to interfere with the Master's discretion with regard to the other items.

APPEAL on behalf of Captain Beresford, M.P., respondent in the matter of the Armagh Election Petition, against the Master's taxation of the costs of the trial.

The objections to the taxation were as follows:—1st. That four guineas were taken off fees paid to counsel on a motion for particulars. The fees paid were five, four, and three guineas, but the Master only allowed three, three, and two guineas. 2nd. That one hundred guineas were taken off Mr. Macdonogh's fee of two hundred guineas on his brief at the hearing. 3rd. That Mr. Monroe's fee of sixty guineas on his brief was reduced to fifty guineas. 4th. That five guineas were taken off Mr. Macdonogh's

Com. Pleas.
1876.

refreshers of twenty guineas *per diem*, making them fifteen guineas *per diem*, the same amount received by Mr. Porter, Q.C., the second counsel in the case. 5th. That six guineas were taken off Mr. Monroe's refreshers, reducing them from twelve to six guineas. 6th. That fees for three consultations out of eight were disallowed. 7th. That five guineas were taken from counsel's fees in the consultations allowed, reducing them from five, five and three guineas to three, three, and two guineas. 8th. That the printing of an analysis of the bill of particulars, amounting to £5 14s. 11d. was disallowed—allowing, at the same time, some fees to the attorney for some trouble in connection with this matter. 9th. That £38 17s. 6d. was struck off the sum of £117 12s. incurred in the preliminary examination of witnesses. 10th. That £214 was taxed off expenses paid to witnesses, amounting altogether to £333 10s., Master Burke considering himself bound by the 34th section of the Act, and the judgment of Morris, J., in the *Galway Election Petition* (1), to allow only one shilling as *viaticum* to witnesses resident in the town. 11th. That various fees and charges on subpœnas were disallowed. 12th. That the payments made to the attorney's assistants for taking evidence were disallowed.

Ante, p. 108.

Macdonogh, Q.C., *Porter*, Q.C., and *Monroe*, in support of the appeal :—

The Master had reduced Mr. Macdonogh's fee to 100 guineas, because 100 guineas was only what was paid to Mr. Porter, and said that if 200 guineas had been given to Mr. Porter, he would not then have disallowed it. It is usual to give the leading counsel a higher fee.

[MORRIS, C.J. :—One leading counsel is supposed to be the same as another, and if there is not a limit put on the fees, they may go up to 1,000 guineas. If a higher fee is given to one counsel than another, it is given for the individual, and not because he is a leading counsel: *Dyott v Reade* (2). The Master has here decided that 100 guineas is the normal fee].

Ante, p. 157.

The petitioner has established the criterion for himself by giving his leading counsel (Serjeant Armstrong) 200 guineas.

(1) 7 Ir. L. T. R. 189.

(2) 10 Ir. L. T. R. 110. (E. N. B. Ed.)

[LAWSON, J.—The fee is 100 guineas, except in special cases. *Com. Pleas.* 1876.
such as the Galway Petition].

The Master has reduced Mr. Monroe's fee from sixty guineas to fifty guineas, because only fifty guineas was allowed in the *Galway Ante*, p. 103. *Election Petition* (1).

[MORRIS, C.J. — It has always been the rule that if 100 guineas was the fee for a Queen's Counsel, fifty guineas should be the fee for a junior.]

The Master has reduced Mr. Macdonogh's refreshers from twenty guineas per day to fifteen guineas, because that was all that was given to Mr. Porter, while he had reduced Mr. Monroe's refreshers from twelve guineas to six guineas, which must be considered out of proportion to the fees allowed to the senior counsel. There have been eight consultations, and only five of them have been allowed. It is of great importance in a case of the kind to consider the evidence that has been given during the day, and to consult as to the best course to adopt the next day. In the Galway case—*Trench v. Nolan* (1)—this Court was of opinion that 100 *Ante*, p. 103. guineas fee to leading counsel was too small, and that the reduction of the refreshers from twenty guineas to fifteen guineas, and the reduction of consultation fees from five guineas to two guineas, was too great.

Serjeant Armstrong, J. Murphy, Q.C., and Kisbey, contra.

This petition was heard in the Christmas Vacation, when business was slack. There is no analogy between this petition and the Galway one. In the borough of Armagh the population was less than 9,000, while in Galway, which was a principality in extent, there was a population of 250,000 interested in the election. Taking the working days of a Queen's Counsel at two hundred days, and calculating his income at the rate at which Mr. Macdonogh was paid here—viz., 100 guineas every eleven days, and fifteen guineas a day refreshers—the result would be about £5,000 a year; and there are few Queen's Counsel in Ireland who would quarrel with that income. The highest fee ever allowed to a junior in Ireland is sixty guineas. No consultation fees were allowed on the days referred to, because no witnesses were

(1) 7 Ir. L. T. R. 189.

Com. Pleas.
1876.
Ante, p. 108.

examined. In *Trench v. Nolan*, the Court—referring to the *Tamworth* and *Southampton* cases (1)—adopted the rule there laid down by Chief Justice Bovill, that the party succeeding is entitled to all costs that were reasonably incurred in the ordinary course of matters of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution or over-anxiety as to any particular case.

MORRIS, C.J.:—

We think that the bill of costs should be sent back to the Master for review in some particulars, and we refuse the motion in regard of the other matters complained of. There is one item of considerable importance—the fee of 200 guineas paid to Mr. Macdonogh, which the Master has reduced to 100 guineas. Now, we do not think that this item should be referred back to the Master at all, not solely on the ground that only 100 guineas was paid to Mr. Porter, although that was a very material element in the case; for, if 100 guineas is deemed sufficient for one of the most eminent men in the profession, the additional 100 guineas must be deemed an artificial fee paid to Mr. Macdonogh, and the person who paid it must pay it out of his own pocket. What was allowed in the Galway Election Petition was 150 guineas, but that was in every respect a case of great magnitude. Now, no person can apply the word magnitude to this Armagh case, and therefore I do not think we should interfere with the discretion of the Master by allowing more than the normal fee of 100 guineas. The same observation applies to the fee paid to the junior counsel. The same ruling applies to the refreshers paid to the senior counsel, but we think that the refreshers paid to the junior counsel are too low. They are not one-half of what were paid to the senior. We refer them back to the Master. We do not interfere with the consultation fees, and we will not refer them back to the Master. They are the same as allowed in any other case. The item for printing we allow, as we think it a very useful thing to have done. The item with regard to the summoning of witnesses we allow. It was a wise precaution to summon them, and the reasonable expenses of those who did attend should be allowed.

(1) *L. R.* 5 C. P. 172.

We allow also the item for the taking down the evidence of witnesses. The bill will be, therefore, referred back to the Master to reconsider the junior counsel's refresher fees, the printing item, and the item for the expenses of witnesses.

Com. Pleas.
1876.

The COURT made the following order :—

It is ordered that it be referred to the Master to reconsider the refresher fees allowed to junior counsel, and to allow the item for printing (No. 138), and that the expenses of summoning any witnesses mentioned in the bill of particulars be allowed; also the necessary costs of the examination and attendance of such witnesses as may happen to have been summoned and attended, to such amount as the Master in his discretion may think fit to allow. Let each party abide their own costs of the argument and judgment in this appeal motion.

Attorneys for the petitioner: *Harris and Tobias.*

Attorney for the respondent: *W. Hardy.*

BOLINGBROKE v. O'RORKE.

(*By permission, from 11 Ir. L. T. R. 101.*)

Rolls,
1877.

Feb. 14.

Practice—Taxation of Costs—Court Fees—Higher and Lower Scale—Withdrawing certificate after appeal—General Order, Nov. 1867.

In a suit to raise a charge of £500, for which purpose it was sought to set aside a deed of assignment on allegations of circumstances amounting to equitable fraud, the Master of the Rolls, holding that the transaction was *bona fide*, dismissed the plaintiff's bill, but this decree was reversed by the Court of Chancery Appeal. The plaintiff's solicitor not considering at the commencement of the suit that there was any question to be taken into account which affected the scale of fees and charges, except that of the amount in dispute, had lodged with the Clerk of Records and Writs a certificate that the lower scale of fees of Court was applicable under the General Order, Nov., 1867; but after the reversal of the decree of the Court below, finding that he had been mistaken, he withdrew the certificate, and lodged his bill of costs on the higher scale, and paid the difference between the higher and lower scale of Court fees payable on behalf of the plaintiff.

Held, that, as the deed was sought to be set aside on allegations of fraud, the higher scale of Court fees was that applicable; and that the

Rolls.
1877.

plaintiff's costs should be taxed on such higher scale accordingly, his solicitor undertaking that all additional fees properly payable thereunder and in the proceedings already had, should be made good.

MOTION on behalf of the plaintiff that the Taxing Master should be at liberty to tax the plaintiff's bill of costs, notwithstanding that such bill of costs had been prepared under the higher scale of fees, and that the plaintiff should be declared entitled to such costs under said higher scale.

Mr. W. H. Peyton, solicitor for the plaintiff, deposed that at the commencement of this suit, not considering there was any question to be taken into account which affected the scale of fees and charges, except that of the amount in dispute in the suit, and the amount in this cause being under £700, he lodged a certificate of lower scale, and his attention was not called to the matter until after the decree of the Court of Appeal in Chancery. F. Gifford, articulated clerk, deposed that in the month of July last, upon drawing the plaintiff's bill of costs in this cause, pursuant to the decree of the 10th of July last, he discovered that the lower scale was, as he believed, inapplicable thereto, and that the plaintiff was bound to pay the difference between the lower and higher scale for the Court fees paid under the lower scale in this cause, whereupon he immediately withdrew the certificate of lower scale and paid such differences in the Court fees. He had not paid the fee on the decree at the time, and he paid that fee in the first instance on the higher scale. On the 20th of July last he lodged the plaintiff's bill of costs in the office of the Taxing Master, and transmitted notice thereof in the usual way. The said costs were drawn on the higher scale, and no bill of costs had been previously drawn or lodged on behalf of the plaintiff. On the 1st of August last he obtained a summons before the Taxing Master (J. F. Teeling, Esq.) for taxation of said costs on the 4th of August last, but, upon the summons coming before the Master in vacation, the costs could not, according to the rule of said Taxing Office, be then proceeded with without the consent of the defendant's solicitor; and Mr. M'Cully, the defendant's solicitor, not having attended, the said summons to tax was adjourned to the 23rd of October last: On the last-mentioned day he attended before the

Taxing Master for the purpose of taxing the costs but the Master declined to tax the bill so lodged on the higher scale upon the ground that the proceedings had been carried on to final hearing upon the lower scale. He directed the former bill of costs to be withdrawn, and a new bill of costs prepared under the lower scale to be lodged in its stead. On the 28th of November he applied to the Taxing Master for his ruling upon the bill of costs, when he directed him to bring it before him on notice. He accordingly applied, on notice, to the said Taxing Master on the 4th of December last to tax said bill of costs so lodged under the higher scale or to make a ruling thereon, which application the Master refused. Mr. W. H. Peyton stated, in addition, that he was advised that if he were to relodge the plaintiff's costs calculated on the lower scale, and if the various items thereof were allowed by the Taxing Master, he would have considerable difficulty in having the taxation reconsidered by the Court. Master Teeling reported as follows:—

“In pursuance of your lordship's order made in this cause, bearing date the 15th of December, 1876, calling on me to certify why I declined to proceed with the taxation of Mr. Wm. Henry Peyton's (the solicitor for the plaintiff) bill of costs, I have the honour to certify to your lordship that when the bill of costs came before me for taxation the gentleman representing the solicitor for the defendant stated he had a preliminary objection to make to the bill of costs as furnished, on the ground that the bill in the suit was filed under the lower scale; that a certificate to that effect had been prepared by Mr. Peyton, and signed by the Master's officer (an attested copy of which he held in his hand, and which he begged to lay before me); that the duty or Chancery fund on the lower scale had been paid on behalf of both plaintiff and defendant during the progress of the suit, and until the cause came on for hearing before your lordship, when your lordship was pleased to make an order dismissing the bill, with costs, to be paid to the defendant by the plaintiff; and that the plaintiff filed a petition of appeal, and that the proceedings in that Court were also carried on under the lower scale; and that it was not until after the petition of appeal had been heard, and an order made in favour of the petitioner declaring him entitled to his costs, that the additional duty between the lower and the higher scale was

Rolls,
1877.

paid by the plaintiff's solicitor. It was, therefore, contended that the defendant should not be then called on, after the case had been disposed of by the Court of Appeal, to pay costs under the higher scale, and that the duty on the lower scale had been paid on behalf of the defendant, pursuant to the certificate furnished by plaintiff's solicitor; he, therefore, on behalf of defendant, declined to pay any further or additional duty. I asked the gentleman representing Mr. Peyton what explanation he had to give on the matter, or why he furnished the costs on the high scale after obtaining a certificate that the proceedings should be carried on under the lower, and under which scale they had been carried on until the final hearing in the Court of Appeal. He admitted that the statement made on behalf of the defendant was quite correct, and that all he had to say on the matter was, that when he came to draw the costs he considered, or it had been suggested to him, that the proceedings should have been carried on under the higher scale, and that he, therefore, furnished the costs under that scale—admitting, without hesitation, that only the duty on the low scale had been paid both on behalf of the plaintiff and defendant during the progress of the suit, and that until the order in the Court of Appeal had been made, and not till then, had the additional duty been paid on behalf of the plaintiff. This explanation I did not consider satisfactory, and stated that, Mr. Peyton having made his selection, I considered he should be bound by it; that he prepared a certificate that the bill had been filed on the low scale, and, in consequence, the duty had been paid both by the plaintiff's solicitor and by defendant's solicitor all through the proceedings, and until the final order by the Court of Appeal on that scale, and, although the additional duty between the high and low scale payable by the plaintiff had been discharged subsequent to the order by the Court of Appeal, the duty between the high and low scale payable on behalf of the defendant still remained unsatisfied; and I suggested that the plaintiff should lodge a new bill of costs drawn on the low scale, intimating, at the same time, that I should be very glad to hear Mr. Peyton if he had any further explanation or reasons to offer to induce me to change my views. Mr. Peyton, however, did not appear before me. Subsequently, however, the gentleman repre-

senting him made a further application that I should tax the costs as lodged (the gentleman representing the defendant being present). Seeing, however, no reason to alter or change the opinion I had formed, I declined to accede to his request. Having stated the facts connected with the case (at, perhaps, a greater length than was necessary) for the information of your lordship, I have, in conclusion, to certify to your lordship that my reason for not taxing the bill of costs in question was in consequence of the costs having been drawn on the higher scale, the proceedings having been (as already stated) carried on all through, until the final order by the Court of Appeal, on the lower scale. However, after the order made by the Court of Appeal, declaring plaintiff entitled to his costs, plaintiff's solicitor paid the additional duty payable by him between the high and low scale, but the additional duty payable by him between the high and low scale payable on behalf of the defendant still remains unpaid; and considering that the default was entirely owing to the course taken by the plaintiff's solicitor, and, also, considering that it was my province before taxing the costs to see that the proper duty payable to the Crown in the suit had been discharged, and as I had no power to enforce the defendant's solicitor to pay the additional duty, I declined to tax the costs until the full duty which should be paid in the suit had been discharged or paid. Had the plaintiff's solicitor offered or proposed to pay the additional duty which remained unpaid on behalf of defendant I would have proceeded with the taxation, but no such proposal was made."

Mr. Monck, for the plaintiff, in support of the motion, cited *Earl of Stamford v. Dawson* (1); *Falls v. Proctor* (2); Order, Nov., 1867; *Morgan's Costs in Chancery*, 7th Ed.

Mr. Jackson, Q.C., contra.

SULLIVAN, M.R. :—

The Taxing Master has given a very clear report indeed as to what took place before him, and of the reasons which guided him in coming to the conclusion he did; and I am not so certain that the Master had not some grounds for coming to that conclusion.

(1) L. R. 4 Eq. 203, 257.

(2) Not reported.

Rolls.
1887.

The matter, which is of great importance so far as it affects the practice of the Court, stands in this way:—The plaintiff filed his bill against Mr. O'Rorke to raise a charge of £500 that he was entitled to on the property of Mr. O'Rorke. But it appeared that, inasmuch as the charge that he had filed his bill to raise had become the property of the defendant, Mr. O'Rorke, under a deed of assignment, executed by the plaintiff, he had framed his bill with a view to raise his charge, praying that the deed should be set aside; and to lay the foundation for setting it aside he relied upon certain alleged facts which amounted to equitable fraud. Now the bill, in point of form, was a bill framed for the purpose of raising £500 only; and, as a matter of course, it would, *primâ facie*, therefore fall within the points mentioned under the General Order, as to costs, of October, 1867, as being a suit conversant with raising a charge under £700, and one in reference to which the rule of taxation on the lower scale would be applicable, inasmuch as the amount was under that figure. But I am clear upon the authorities that have been referred to, that where it is necessary, in order to raise a charge, to set aside a deed of assignment on the ground of the fraudulent conduct of the party giving it, the case comes not within the lower scale, but within the higher scale. In my view it was a case in which the solicitor would not have been justified in lodging a certificate under the lower scale at all. This course he should not have adopted. No doubt what Mr. Monck says is true, that that was a mistake into which the solicitor might have fallen *bonâ fide*; he might have been guided by the amount, and might not have had sufficient knowledge of the circumstances. The facts proved it to be one of the cases in which the lower scale would not have been applicable, and whatever may have happened afterwards the certificate was lodged *bonâ fide* under the belief that it was applicable. The General Order is this:—“(1) Solicitors shall be entitled to charge, and be allowed, fees according to the ‘lower scale’ in the several cases following, unless the Court make order to the contrary, that is to say—” and then it specifies under the head applicable to these cases “suits for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £700.” In any

case proper for it, the Court gives the solicitor a right to file with the Clerk of Records and Writs a certificate in the form set forth, a copy of which certificate must be issued at the request of any solicitor or any party acting in person in the suit. The form of certificate is as follows:—"I hereby certify that, to the best of my judgment and belief, the lower scale of fees of Court is applicable to this case." And on production of the certificate the officers of the Court shall receive and file all proceedings in the suit or matter bearing stamps according to the lower scale. And the order then proceeds—"In any case certified for the lower scale of Court fees, in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the higher scale of solicitors' fees, the deficiency in the fees shall be made good." The only other part of the order necessary to read is, "In all other cases solicitors shall be entitled to charge, and be allowed, fees according to the higher scale in the schedule hereto, unless the Court shall make an order to the contrary, as to all or any of the parties." Now it is manifest and plain that this last clause entitles a solicitor, as a matter of right, to tax his costs on the higher scale in any case not falling within the several heads specified. It provides also for a lower scale being converted into a higher scale, if he is entitled so to charge. It is the practice of the Record and Writ Office, invariably, that a solicitor who lodges a certificate for the costs to be taxed on the lower scale can withdraw his certificate during the progress of the suit. He is allowed to do that as a matter of right. The moment he withdraws his certificate, the officer of the Court marks on the certificate "withdrawn." The cases that have been suggested are very different from the present, being where the claim of the solicitor was referable to costs which did not fall within the lower scale, and where, for the sake of saving a few shillings, he would certify for the lower scale, and then, upon the decree being in his favour, withdraw his certificate. That is the precise distinction in this case. What are the facts? The case turned out to be one that rested on allegations of fraud. [His Lordship referred to the circumstances.] I held that the transaction in question was *bonâ fide*, and dismissed the plaintiff's bill with costs, and relieved Mr. O'Rorke from the imputations cast upon him. The plaintiff

Rolls.
1877.

appealed, and the Court of Appeal took an opposite view and gave him a decree (1). It is perfectly clear that fraud being the allegation on which he sought to set aside the deed, the lower scale was not applicable. Mr. Peyton lay by until after the decree in this Court, and went into the Court of Appeal on the lower scale; and after he filed his appeal he discovered that his proceedings were wrong, and that he should have proceeded on the higher scale, and then withdrew his certificate. If I thought he was guilty of a subterfuge I would give him no aid; but it would be a strong thing to hold that in a case like this. I am not prepared to assume that against him in the teeth of the affidavit. I think he made a mistake originally. Therefore, I am of opinion that, it being the right of the suitor to have the certificate withdrawn by the solicitor, he was justified in this case. I cannot fix the time when the right to withdraw ceases; and, as pointed out by Mr. Monck, the decree in the Court of Appeal did not note this matter, as an account was to be taken in the office. Under these circumstances the costs must be taxed on the higher scale, Mr. Peyton undertaking that the difference of the Court fees shall be made good; and he must bear his own costs.

Ordered—That the Taxing Master in this cause do proceed to tax the plaintiff's costs in the cause, pursuant to the said decree; and that such costs be taxed on the higher scale of fees, Mr. W. H. Peyton, the plaintiff's solicitor, undertaking that all additional fees properly payable by the plaintiff under the said scale and the proceedings already had in the cause shall be made good; and the Court doth order that the said Mr. W. H. Peyton bear his own costs of this motion and order.

Solicitor for the plaintiff: *W. H. Peyton.*

Solicitor for the defendant: *A. McCully.*

(1) The decree of the Court of Chancery Appeal was afterwards reversed by the House of Lords: see 11 Ir. L. T. & S. J. 386, 400.—(E. N. B., *Ed.*)

BRADY v. TUCKEY.

(By permission, from 12 Ir. L. T. 309).

Chancery.
1877.

July 8.

(Before BALL, C.)

Costs—Sale by Mortgagee—Auction—Advertisements—Attendance of Solicitor at Sale.

THIS was an application on behalf of Mr. Tuckey to review certain rulings of Master Teeling. The applicant had sold by auction Mr. Brady's estate, situate at Ballinamore, County Leitrim, pursuant to power in a deed of mortgage made to him, and the questions now involved were as to the amount for advertising the sale, and as to the expenses of the mortgagee's solicitor attending the auction. It appeared that postings for sale had been advertised three times in the *General Advertiser*, *Freeman's Journal*, *Daily Express*, *Irish Times*, and a local journal, and that Master Teeling only allowed for one advertisement in each. He had also disallowed the travelling expenses of the mortgagee's solicitor for attending the sale.

Walker, Q.C. (with him *Gerrard*), for the mortgagee.

Lawless, Q.C., for the mortgagor.

At the conclusion of the arguments the Lord Chancellor said that he would consult the Master of the Rolls on the subject.

Judgment deferred.

BALL, C.:—

In this case I shall now proceed to state the views which, after consultation with a judge of such great experience as the Master of the Rolls, I have adopted. The first item is as to the sums disallowed for advertising, £16; and in considering the propriety of that charge it is to be borne in mind that the costs were incurred in connexion with a sale by a mortgagee under a power in his mortgage. A vendor in that position is bound to use his best endeavours that the property should not be undersold. The mortgagee had ample security for himself, but this duty was not

Chancery.
1877.

merely to pay himself—he had to make the surplus as large as he could for the mortgagor. No plan was so likely to insure competition at the sale as advertising, and if a mortgagee in that position was to advertise inadequately he would leave himself open to the imputation of regarding only his own interests. Having regard to these considerations, I am of opinion, and I have the concurrence of the Master of the Rolls, that the sum here expended for advertising was not unreasonable, and that therefore the sums disallowed by Master Teeling should be allowed. As to the second item, I think it was of the most vital importance that the solicitor, or some legal person, should be present at the sale to see, on behalf of the mortgagees, that such a contract was made with the purchaser as would avoid a suit for specific performance or some future litigation. I shall, therefore, allow that charge also. There will be no costs for the application, however, as it was an appeal from the Taxing Master.

Exchequer.
1878.

Nov. 11.

DENNIS v. BEST.

(By permission, from 12 Ir. L. T. R. 152)

(Before PALLES, C.B., and FITZGERALD, B.)

Taxation of Costs—"Higher Scale" and "Lower Scale" in Actions for Recovery of Land on Title—Compromise as affecting Costs—Schedule of Fees Order, December 26, 1877, r. 6; Rules, April, 1878, Order VIII.

In an action for the recovery of land on the title, involving the ownership of an estate of the annual value of £500 a year, while, had not the action been instituted, the title to the fee-simple, moreover, would have been barred by the operation of a sale in the Landed Estates Court, the plaintiff's title had to be established under extreme difficulties, caused by the necessity of giving secondary evidence of deeds under which the plaintiff claimed, in consequence of their having been lost or destroyed by an ancestor of the defendant, through whom the defendant claimed. At the trial a compromise was entered into, providing that judgment should be entered for the plaintiff, with costs.

Held, that the costs, as provided for by the terms of the compromise, should be taken to mean the legal costs as taxable upon the true construction of the Rules of Court, and not costs as taxable at the time of the compromise being entered into; and that the circumstances of the case were such as to warrant the exercise of the discretion of the Court

by allowing the costs to be taxed according to the "higher scale" provided by the Rules of the Supreme Court of Judicature (Ireland), April, 1878. *Exchequer.*
1878.

MOTION, that the plaintiff be allowed in this action the fees set forth in the column headed "higher scale" in the Schedule to the Rules of the Supreme Court of Judicature (Ireland), April, 1878, and that the plaintiff be declared entitled, in addition to the costs at the date of the Judicature Act allowed on taxation as between party and party, to all other costs, charges, and expenses reasonably incurred by the plaintiff for the purpose of this action.

The action was brought for the recovery of a certain estate, containing upwards of 400 acres, in the County of Wicklow, producing an annual rental of about £500 a year, under the will of Henry Scott, who was devisee under the will of the late Lady Elizabeth Stratford. The defendants had gone into the receipt of the rents of the lands on the death of the late Earl of Aldborough, alleging he was seized in fee-simple, and claiming to be entitled thereto as his co-heirs at law, and had instituted proceedings and obtained an order in the Landed Estates Court for the sale of the lands. The plaintiff thereupon applied to the Landed Estates Court to discharge the said order, and made and filed an affidavit fully disclosing his title to the said lands; and, upon hearing of such application, which the defendants resisted, an order was made directing that the motion should stand adjourned till a future day, with liberty for the plaintiff in the meantime to take proceedings to establish his title. The principal difficulty in the case arose from, and was occasioned by, the absence of the title deeds, which were traced to the custody of the late Earl of Aldborough, and proved to have been in his possession, and to have been either lost by him or destroyed while in his custody. In consequence of the loss of the deeds it became necessary for the plaintiff to make search in every place where there was a possibility of their being found before secondary evidence of their contents should be given, and this entailed an extensive correspondence with several persons who had formerly been connected with the Aldborough family, and also attendances upon several solicitors, &c., at their offices, and searches for the missing deeds, and for evidence of their preparation and existence had to be made, which work was of a very

Exchequer,
1876.

arduous nature, and necessitated the perusal of a great number of deeds, letters, accounts, orders of Court, rentals, bills of costs, and other papers, which were sworn to have amounted to several thousand folios. And, for the same reason, it also became necessary for the plaintiff to prove receipt of the rents and other acts of ownership by the said Lady Elizabeth Stratford and by the late Earl during the life of his father and also during the life of Lady Sophia Stratford; and this entailed the necessity of attending at Baltinglass for seven days examining witnesses, inspecting tenants' leases or agreements for leases, and old maps in their possession, and comparing the same with the now existing fences and boundaries on the lands, and procuring information relative to the receipt of rents by the late Lady Elizabeth Stratford and the sixth Earl of Aldborough from the death of the fourth Earl down to the death of the sixth Earl. This proved a very difficult undertaking, as the plaintiff had to prove payment of rent to Lady Elizabeth Stratford and Lord Aldborough out of each separate holding on the property, as, owing to the fact that the plaintiff had no reliable evidence of the exact lands of which Lady Elizabeth Stratford was seized in fee, the plaintiff had to be prepared for the defendants going into a part and parcel case, which they did do at the trial. In addition to the above searches, the plaintiff had to make long searches in the Registry of Deeds Office, the Public Record Office, the Landed Estates Court, and the Courts of Common Law, and also at the Civil Bill Courts of Wicklow and Baltinglass for records of former proceedings relative to the lands in dispute, which occupied a long space of time. A large number of witnesses were subpoenaed from various parts of the country to prove the details of the plaintiff's case. The plaintiff's solicitor stated, by affidavit, that unless the costs should be taxed according to the higher scale, as between solicitor and client against the defendant, the plaintiff would be out of pocket to a large amount for costs necessarily incurred. The action was tried at the Summer Assizes, 1878, and was then compromised on certain terms, one of which was that judgment should be entered for the plaintiff, with costs.

W. Ryan, Q.C., and R. Robertson, on behalf of the plaintiff, in support of the application:—

Exchequer.
1878.

According to Rule VI., Part I. (A), of the Order of the 26th December, 1877, as to Court Fees, in all actions for purposes to which any of the forms of endorsement of claim on writs of summons in Part II., Sections II., IV., and V., of Appendix A. to the Rules under the Judicature Act are applicable, except in certain actions of injunction, fees, and percentages are to be taken on a certain prescribed scale, entitled “lower scale.” Among the class of actions thus defined are actions for the recovery of land, both on the title and for non-payment of rent. By Order VII. of the Rules of the Supreme Court of the 8th April, 1878—the Order regulating the amount of solicitors’ costs—the provisions of Rule VI., Part I., of the Order of the 26th December are adopted as the test of cases in which costs in general are to be taxed upon the “lower scale.” In all actions for recovery of land, accordingly, costs are, as a general rule, to be calculated upon the “lower scale.” However, the latter part of Order VII. of the Rules of April, 1878, prescribes that the Court or a Judge may, in any case, direct the fees to be allowed to all or any of the parties, and as to all or any part of the costs, according to either the “higher scale” or the “lower scale.” We seek to bring the present case within this proviso by showing that it is a case for the exercise of the discretion thus provided for. According to the rule in the English Chancery Courts, in cases of foreclosure £1,000 is considered as the boundary line between cases where the higher and lower scale of costs are applicable. In *Cottrell v. Stratton* (1), James, L.J., states, as to this rule—“It is in accordance with the common feelings of mankind that we should not, and ought not, to impose the same amount of costs in small as in large transactions. To effect this purpose some rule must be made, £1,000 was taken as the sum at which to draw the line.” Costs on the “higher scale” were allowed in an action on a bill of exchange in the Chancery Division: *Pooley v. Driver* (2). We submit that the limit of the £1,000 is a fair one, and ought to be followed in this case. Here property to the value of between £13,000 and £14,000 has been recovered, and it is not the mere annual value of the estate which

Exchequer.
1878.

was at stake, but, inasmuch as a petition for sale had been filed in the Landed Estates Court, the title to the whole could have been barred if the plaintiff had not brought this action. The entire difficulty, moreover, was caused by the act of the party through whom the defendants claimed in having lost, or made away with, the deeds which established the title of the plaintiff. These deeds not being forthcoming, it became necessary for the plaintiff to give secondary evidence of their contents, and, for that purpose, to exhaust every possible source from which information as to them might be obtained, and to search every locality where they could possibly be supposed to be hidden—an undertaking fraught with difficulty and expense. The Judge at the trial had no power to aid us in the matter, according to *Baker v. Oakes* (1).

[The Court having expressed an opinion adverse to the second portion of the motion—viz., as regards the costs, charges, and expenses incurred, it was abandoned by the plaintiff's counsel.]

Hemphill, Q.C., and *W. Anderson* for the defendants:—

We resist this application upon two grounds. In the first place, the action is one against an heir-at-law in possession of the estate. Will the heir-at-law be placed by the Court in the unfavourable position of having to pay indemnity-costs between solicitor and client of the opposite side when defending the estate of his ancestor?

[*PALLES, C.B.*—Your clients were the heirs-at-law, but not the heirs of the ancestors.]

Secondly, this action was compromised at the trial, and the consent provided for costs being paid to the plaintiff, which costs, in the absence of any agreement to the contrary, must be taken to be the costs then taxable, and they were costs according to the "lower scale." This being a matter of compromise it lay upon the plaintiff to suggest, as one of the terms of the compromise, that costs should be taxed upon the "higher scale." If this had been suggested the action might have been fought out.

Exchequer.
1878.

PALLES, C.B.—This is a very important motion, and, I believe, the first instance of such an application in any Division. Having heard the points very fully argued we have come to a clear conclusion that it is a case to which the “higher scale” of taxation ought to be applied. I wish to take the question, in the first instance, as if no compromise had been entered into between the parties at the trial. We have, then, as the subject-matter of the suit, an action for the recovery of land on the title, involving the ownership of an estate of the value of £500 a year, and not the mere possession of that estate, but the title to the fee simple, which would have been barred for ever through the operation of the Landed Estates Court if this suit had not been instituted. The plaintiff’s title, too, had to be established in the face of extreme difficulties, which difficulties were caused by the Earl of Aldborough, through whom the defendants claimed. The object of the rules as to costs is to segregate cases of greater from those of less difficulty, and in those of less difficulty to make the “lower scale” of costs applicable, subject to the discretion of the Court. The class of cases specially instanced as proper for the higher scale of taxation are “actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringement of rights, easements, patents, and copyrights.” If, accordingly, this were a case not of recovery of the fee-simple of the estate, but merely to establish a right to an easement incident to the fee, such as a watercourse, the “higher scale” would, by the very words of the rule, be applicable. Actions for the recovery of land were, as a rule, included within the “lower scale,” but this is because the great majority of such actions on the title in Ireland are cases between landlord and tenant, in which no title to large estates is in question. Here we have the title to the fee-simple of large estates involved—a case abounding with every element of difficulty, caused by the individual through whom the defendants claimed, so that, apart from the question of the compromise, I have no doubt that it is one for the exercise of the discretion of the Court in favour of the plaintiff. Turning, then, to the compromise, we have been told by the counsel for the defendant that it is to be construed as a consent by the plaintiff to have the costs

Exchequer.
1878.

taxed, as they then would have been, unless this application had been made, upon the "lower scale." We do not think so. We think that the true construction of the consent is that the costs should be taxed according to law—that unless an express stipulation were introduced into the consent that the costs should be taxed upon the "lower scale," the parties must be taken to have agreed to abide by taxation according to the legal construction of the rules. We accordingly order that the plaintiff's costs in the case be taxed according to the "higher scale"; but as this is the first case in which an application of this nature has been made, and as the plaintiff's counsel have very properly abandoned the latter part of the motion, we will give no costs of the motion.

FITZGERALD, B., concurred.

Order accordingly.

Solicitors for the plaintiff: *Meade & Colles.*

Solicitors for the defendants: *Longfield, Davidson & Kelly.*

Exchequer.
1879.

LAPSLEY v. BLEE.

(By permission, from 6 L. R. Ir. 155; s. c. 13 Ir. L. T. R. 174.)

Nov. 4, 12.

Appeal.

Nov. 17.

(In the Exchequer Division, before PALLES, C.B., and FITZGERALD, B. In the Court of Appeal, before BALL, C., MORRIS, C.J., and FITZGIBBON, L.J.)

Costs—Judgment by Default—Amount recovered not exceeding £20—Parties Resident within same Civil Bill Jurisdiction—Judicature Act, 1877, s. 53—Common Law Procedure Act, 1856, s. 97—Order VIII. (April, 1878), Rule 2—General Order XII., Rule 3.

The 97th section of the Common Law Procedure Act, 1856, has not been repealed by the 53rd section of the Judicature Act, and remains in force with respect to the costs as well of undefended actions as of those tried before a jury. The effect of Order VIII., Rule 2, of April, 1878, is merely to ascertain the amount of costs in actions where judgment is marked by default in those cases in which a plaintiff is entitled to costs.

In an action upon a bill of exchange for a sum under £20 both parties resided within the civil bill jurisdiction in which the cause of action arose, and there were admittedly no grounds for holding that the case

was one fit to be tried in the Superior Courts. Judgment having been allowed to go by default :—

Exchequer.
1879.

Held, by the Exchequer Division and by the Court of Appeal, that the 97th section of the Common Law Procedure Act, 1856, disentitled the plaintiff to costs.

EX PARTE application, on behalf of the plaintiff, that, in pursuance of the 53rd section of the Judicature Act and of Order VIII. (8th April, 1878), Rule 2, the costs of the action should be added to the judgment marked by default on the 14th October, 1879. The action was upon a bill of exchange, and the plaintiff and defendant both resided in the civil bill jurisdiction of the County of Donegal, where the cause of action arose. The judgment was for a sum less than £20, and the Master declined to insert costs in the judgment.

Effe, in support of the motion :—

The costs of an action like the present are not within the discretion of the Court. The 53rd section of the Judicature (Ireland) Act, 1877, enacts that, “subject to the provisions of this Act and of Rules of Court, the costs of, and incident to, every proceeding in the High Court of Justice and Court of Appeal respectively shall be in the discretion of the Court,” &c. The Rules of Court dealing with the subject are General Order XII. and Order VIII. of 8th April, 1878. The 3rd Rule of General Order XII. provides that, in such a case as this, “the plaintiff, upon filing an affidavit specifying the amount actually due, may sign final judgment for such sum, not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs,” &c. The 2nd Rule of Order VIII. of 8th April, 1878, defines the amount of costs to be allowed. To this extent the plaintiff is, therefore, absolutely entitled to costs. The 53rd section of the Judicature Act, 1877, corresponds to the English Order LV., except as to the words within brackets in the Irish section, which are as follows :—[“Subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein.”]. The effect of these and the following words in the section is to except out of the provision that costs shall be in the discretion

Exchequer.
1879.

of the Court costs in an action tried by a jury (which costs are alone the subject-matter of the proviso), and the clause puts two limits upon the discretion already given by the section:—First, when the costs are within an enactment limiting, regulating, or affecting costs payable in any action by reference to the amount recovered therein; and secondly, for any special cause shown and mentioned in the Order. This is the grammatical and logical reading of the 53rd section. It has been decided that the effect of the English Order LV. has been to repeal the 21 Jac. I., c. 16, s. 6, which provided for costs in certain actions: *Garnett v. Bradley* (1). A similar construction should be given to section 53 of the Irish Act, which corresponds with the English Order. By that section of the Judicature Act, 1877, costs are now in all cases (subject to the Act and Rules made thereunder) to be in the discretion of the Court or Judge, and the provisions of the Common Law Procedure Acts limiting costs by the amount recovered, save the costs of trials before juries, are repealed. This case is expressly provided for by the Rules made under the Act, and the costs are, therefore, not within the discretion of the Court.

Cur. adv. vult.

Nov. 12. **PALLES, C.B. :—**

Both the parties in this action (which is brought upon a bill of exchange) reside in the County of Donegal, where the cause of action arose. The plaintiff has recovered judgment by default for a sum less than £20, and he now moves for a direction to the officer to enter the judgment for costs as well as debt. He does not contend that the action was one which could not have been tried in the County Court, or that it was fit to be tried in one of the Superior Courts; and he, therefore, admits that, if the 97th section of the Common Law Procedure Act, 1856, be an existing enactment, costs cannot be recovered. He contends, however, that the effect of the Judicature Act is to render that section inapplicable to a case like the present, which was not tried by a jury. He says that such costs were, prior to the Orders of the 8th April, 1878, in the discretion of the Court, and that the 2nd Rule of Order VIII. of these Orders takes away that discretion,

and entitles him absolutely to costs to the extent of the sums mentioned in that Rule.

Exchequer.
1879.

In support of his first proposition, the plaintiff relies upon the well-known case of *Garnett v. Bradley* (1), in which it was held that Order LV. under the Judicature Act in England repealed the Statute of 21 Jac. I., c. 16.

The 53rd section of our Judicature Act is not identical with the English Order LV.; on the contrary, it contains words which appear to me to have been inserted for the express purpose of excluding the questions raised in *Garnett v. Bradley* (1). Both the English Rule and our section commence with a general provision that the costs of every proceeding shall be in the discretion of the Court. Each then contains a saving, not germane to the matter in hand, as to costs of trustees and others, and then follows a proviso in reference to the costs of an action tried by a jury. It is here that the difference between our section and the English Rule occurs. The Rule provides that "where any action or issue is tried by a jury the costs shall follow the event, unless, upon application made at the trial for good cause shown, the Judge . . . or the Court shall otherwise order." The main difference between this proviso and that in the Irish section is, that in the latter, after "provided that," we have these words—"subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein."

Now, the argument of the plaintiff's counsel is, that the decision in *Garnett v. Bradley* (1) was mainly based upon the first clause of the Order LV., which is in terms the same as the first portion of our 53rd section; and he contends that the effect of the introduction of the words I have mentioned into the proviso, as distinguished from the portion of the clause which confers general discretion as to costs, is to except, out of the provision that costs shall be in the discretion of the Court, costs in an action tried by a jury. He says that these costs are alone the subject-matter of proviso, and that such proviso (including the words which do not occur in the English Order) does no more than impose in reference to these costs two limitations upon the exercise of the discretion

Exchequer.
1879.

given by the earlier part of the section—viz., 1st, that it be for special cause shown and mentioned in the Order; 2nd, that where the costs are within an enactment limiting, regulating, or affecting the same, by reference to the amount recovered therein, the discretion is controlled by such enactment. In my opinion this argument is untenable. I need not say that if the words of our section were substantially the same as those of the English rule, the decision of the House of Lords would be conclusive. But where the words which we have to construe are not identical with those which were the subject of the House of Lords decision, we cannot take the decision *per se*. We must ascertain the *ratio decidendi*, and consider whether it is applicable to a subject-matter which contains the additional words which we have in the section before us. Now, what was the decision in *Garnett v. Bradley*? (1) The Order had provided generally that costs should be in the discretion of the Court. Then came a proviso, that where an action was tried by a jury the costs should follow the event, unless for good cause shown. That was a proviso imposing a fetter upon the exercise of the discretion of the Judge, in the case of a cause tried by a jury. But the general provision was in antagonism to the Statute of Gloucester, and other statutes which gave costs at Common Law; and these statutes were accordingly held to have been repealed by the conjoint effect of the rule and the section of the Judicature Act. The Act of James I., however, was one which operated by way of exception out of the Statute of Gloucester; and the decision of the House of Lords was, that the repeal comprised not only the Statute of Gloucester, but also the Statute of James I., which operated by way of exception out of it. Now, the statute of James was in nowise expressly referred to in the statute or the rule; and the real question for the decision of the House of Lords was, whether in such a case the general Act, *i.e.*, the Judicature Act, could be construed as repealing the particular statute of James I. by mere implication; or whether the general rule, that costs should be in the discretion of the Court, could not stand, with the exception that in certain specified cases that discretion could not be exercised so as to give any greater sum for costs than had been found for damages. It will be found

that the greater portion of the judgment of the learned Lords is occupied by the discussion of what is the meaning of the old maxim, *generalia specialibus non derogant*, and that the decision is based upon their opinion that the statute of James I. was not a "special Act" within the meaning of that maxim.

Exchequer.
1879.

But in reference to our statute we have not to consider whether an Act dealing with a particular subject-matter is repealed by implication by the general words of a subsequent statute; because this enactment (Common Law Procedure Act, 1856, s. 97), being one "affecting the costs payable in an action by reference to the amount recovered therein," is expressly referred to in the section, and treated as an existing enactment. The intention was, that effect and operation should to some extent, at least, after the passing of the Judicature Act be given to this section. *Garnett v. Bradley* (1) cannot, therefore, apply. Indeed this cannot be shown more clearly than by Lord O'Hagan's judgment in the latter case. He says (2): "There are two interpretations, either of which might possibly be entertained, the one recognising the existence of the antecedent statutes, the other regarding them as repealed; and I prefer the latter as in my mind manifestly accordant with the general intention of the Act, and calculated to attain the benefit at which it aimed, and to remedy the mischief it sought to remedy."

Here we cannot refuse to apply the interpretation recognising the existence of the antecedent statutes, because the clause itself, in very words, states their existence, and legislates in reference to them. No doubt the section would have been more aptly framed if the words in question had been inserted in the earlier part of the clause. The section would then have read thus: "Subject to the provisions of the Act, the rules, and of all existing enactments regulating or affecting the costs payable in any action by reference to the amount recovered, the costs of every proceeding shall be in the discretion of the Court;" and then would follow the provisoes in reference to the costs of trustees and the costs of actions tried by juries.

It has been argued that the first portion of the clause would, *per se*, and standing alone, have wholly repealed the statute in

(1) 3 App. Cas. 944.

(2) *Ibid.* 960.

Exchequer.
1879.

question, and I think that the decision in *Garnett v. Bradley* (1) goes that length. Then it is said that as this operation is prevented solely by the proviso, it should not be affected beyond the subject-matter of the proviso. This reasoning divides the clause into two portions, and construes the first without reference to the second. In my opinion the clause must be taken as a whole; and construing it thus, the proviso rebuts the inference which would have arisen from the earlier portion of the section of an intention to repeal the statute in question.

We hold that the 97th section of the Act of 1856 continues in force, and regulates costs in applicable cases, whether the action be or be not tried by a jury, and that the Master was right in declining to insert costs in the judgment.

I may add that I think the 2nd Rule of Order VIII. of 8th April, 1878, does no more than ascertain the amount of costs in cases in which the party is by law entitled to costs, and does not give him costs when, but for that Rule, he would not have been entitled to them.

FITZGERALD, B., concurred.

Application refused.

The plaintiff appealed.

Appeal.
1879.

Eiffe, for the plaintiff, the appellant:—

Nov. 17.

The decision here involves the determination of what is the rule as to costs in all actions tried by any mode of trial, or not tried, when the plaintiff recovers, exclusive of costs, less than £20 in contract, or less than £5 in tort. Another question is, whether the rule as to costs in these cases, though a matter of procedure, is, unlike other matters of procedure, outside the power of the Supreme Court to alter or regulate. Reading the 53rd section of the Judicature Act grammatically and logically, and so as to harmonise with the objects and principles of the Act, it means that costs are in all cases, subject to the Act and Rules, within the Judge's discretion; provided that when the action or issue is tried by a jury the successful party shall be entitled to his costs, subject in the case of the plaintiff to the provisions of the statutes

Appeal.
1879.

referred to in the parenthesis, unless special cause be shown; but if it be shown, the Judge's discretion, under the proviso as to jury trials, is as large as under the first clause of the section. *Garnett v. Bradley* (1) really amounts to this, that Order LV. (English) makes a *tabula rasa* of all the old statutes as to costs, on the ground that its provisions are inconsistent with their existence, and that they were not special Acts within the maxim *generalia specialibus non derogant*, and therefore not saved from the operation of the maxim *leges posteriores contrarias abrogant*, and of the 33rd section of the English Judicature Act; and, therefore, that a plaintiff who recovers in an action tried by a jury any sum whatever is entitled to full costs, unless the Judge, for good cause, otherwise orders. The 53rd section of the Irish Judicature Act is similar to Order LV. (English), with the addition of words in brackets, and, save so far as altered by these words, it should receive a similar construction. The words in brackets were inserted to meet the decision in *Garnett v. Bradley* (1), *i.e.*, to provide that where a plaintiff recovers in an action tried by a jury less than £20 in contract or not above £5 in tort, save in the few excepted cases, no costs in some cases, and not more than half in others, should be given, unless the Judge otherwise orders; but it was not intended thereby to preserve for all purposes the antecedent statutory enactments limiting costs. The words in brackets should be read as qualifying the words "the costs," as, in fact, a re-enacting of the existing statutes so far as they affect the plaintiff's costs in jury trials. If this be not so, the force of the words "unless the Court or Judge shall for special cause otherwise order" will be destroyed in many cases where they would probably be acted upon where the plaintiff recovered less than £20 in contract or not above £5 in tort, and the Judge cannot order a plaintiff who recovers only six shillings in a vexatious action to pay the defendant's costs, as was done in *Harris v. Petherick* (2). The principle of partial repeal and partial preservation of statutes is a leading feature of the Judicature Act, and is distinctly enunciated in the 71st section, and the construction suggested harmonises with the object of the Judicature Act to assimilate the procedure and practice of the High Court to that of the Court of Chancery:

(1) 3 App. Cas. 944.

(2) 4 Q. B. Div. 611.

Appeal.
1879

Garnett v. Bradley (1); *Parsons v. Tinling* (2). The plaintiff having recovered judgment in default of appearance in an action of debt, he is entitled, under Order XII., Rules 3, 5, to a "sum for costs," and under the Rules of April, 1878, Order VIII. Rule 2, these costs are £1 17s. We contend that the 97th section of the Common Law Procedure Act, 1856, now only applies to cases tried by a jury, though before the Judicature Act it was otherwise: *Bennett v. Scott* (3). If the Common Law Procedure Acts, in so far as they relate to costs, are outside the operation of the Judicature Act, then the discretion of the Judge is done away with in the Chancery as well as in the Common Law Divisions: *Padley v. Camphausen* (4). The effect of the 243rd section of the Common Law Procedure Act of 1853 on a trial in the Chancery Division is to destroy the discretion of the Judges in all these cases, whilst the policy of the Judicature Act is to place matters of procedure within his discretion.

[FITZGIBBON, L.J.:—That is but criticising the wisdom of the Legislature. In *Cassidy v. O'Loghlen* (5) it was pointed out that although it was not desirable to establish a different practice here from that in England, yet the Irish Judicature Act has made an exception which differs from the English Act.]

In *Parsons v. Tinling* (6) it was held that the words "follow the event" in Order LV. (English) constituted a general provision as to costs. The first part of the 53rd section, and the whole but for the parenthesis, would, by virtue of its very phraseology, repeal all previous statutes. The meaning of the proviso is, that the Common Law Procedure Acts are preserved as to jury trials, having regard to the amount recovered. The bracketed words are placed in immediate proximity to the provisions as to costs of actions and issues tried by a jury in order to indicate that the exception retaining the old rule as to costs applies to such cases only. Had it been intended to apply these words to all cases the proviso would have been placed at the commencement of the section.

(1) 3 App. Cas. 944.

(2) 2 C. P. Div. 119.

(3) 8 Ir. Jur. (N.S.) 204.

(4) 10 Ch. Div. 550.

(5) 4 L. R. Ir. 1.

(6) 2 C. P. Div. 119.

BALL, C. :—

Appeal.
1879.

Counsel has said all that it was possible to say to induce us to reverse the order of the Exchequer Division. We think, however, it ought to be affirmed. The question is, has the 97th section of the Common Law Procedure Act of 1856 been repealed, or is it still in existence in cases where a trial by jury has not been had? Now, that section regulates the amount of costs to be paid by the defendant to the plaintiff in certain cases by the sum the plaintiff shall recover in the action. That the words “recover” includes undefended cases is shown by the expression “in case there shall be no trial.” This section thus using the word recovered so as to include both defended and undefended cases, we come to the 53rd section of the Judicature Act:—“. . . Provided that (subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein) the costs of every action, question, and issue tried by a jury shall follow the event,” &c. Now, what does this proviso do? By its very language, from the very force of the terms it uses, it treats as existing all enactments affecting the costs by reference to the amount recovered; it treats that previous section of the Common Law Procedure Act as existing which includes both defended and undefended cases. Whether the section is repealed or not as to certain cases is to be ascertained by the intention of the Act as shown in the 53rd section itself, and any intention to repeal is rebutted by words which treat the previous enactment as continuous and existing.

There is another matter in this case; that is the effect of Order VII. of the Rules of April, 1878. That Order was not made for the purpose of defining whether or not the plaintiff or the defendant is entitled to costs, but to define what charges are to be made by the solicitor; for what is the preamble? “The following regulations as to costs of proceedings in the Supreme Court of Judicature (Ireland), save proceedings before the Land Judges of the Chancery Division, shall regulate such costs from the commencement of the Supreme Court of Judicature Act (Ireland), 1877.” There is nothing in this preamble giving either the plaintiff or defendant a right to costs; these words are simply directory as to the amount to be allowed to the solicitors; and when we come

Appeal.
1879.

to Order VIII. these prefatory words must again be considered as they affect the whole matter. It does not therefore appear to me that the intention of this section was to define the cases in which parties had or had not a right to costs, but to define the charges which were to be made; and that seems to be the view taken by the Chief Baron also. "I may add," he says, "that I think the 2nd Rule of Order VIII., of 8th April, 1878, does no more than ascertain the amount of costs, in cases in which a party is by law entitled to costs, and does not give him costs when but for that Rule he would not have been entitled to them." Certainly the words in Order VIII., are stronger than in Order VII., but I think they must be taken only to regulate the amount to be charged; and that when the Order says, "In all cases in which a plaintiff shall have obtained a judgment by default, there shall be added by the officer to the principal sum for which such judgment is marked the following sums for the costs thereof, and no more" what was intended was to fix the amount to be charged, and not to define the right that appertain to the individual. In other words, it is the same as if the Order said in every case where plaintiff *was* entitled, he should get so much for costs, and no more. I hold that the order of the Exchequer Division ought to be affirmed.

MORRIS, C.J., concurred.

FITZGIBBON, L.J.:—

On the construction of the English Judicature Act, it was at least doubtful whether the statutes limiting the amount of costs were or were not repealed by implication, for in *Garnett v. Bradley* (1) the Court of Appeal and the House of Lords differed upon the question. In our Act we find a clause which, in the event of a trial by jury, admittedly and expressly gives operation to the previous statutes, and does so by describing and treating them as "*existing enactments.*" These words negative the intention to repeal them; and moreover, by referring to these statutes, for example, to the Common Law Procedure Amendment Act of 1856, section 97, it will be seen that it would be very difficult, if not impossible, to separate their clauses and read them as "*existing*

(1) 3 App. Cas. 944.

enactments affecting the costs payable in any action by reference to the amount recovered therein " after a trial by jury, while treating them as repealed in other cases. Then, looking at the substance of the thing, while it may be desirable to give the Court uncontrolled discretion as to the costs in all cases, as has been done in England, it is very hard to conceive any reason for taking away that discretion, and limiting the plaintiff's right to costs, only in the one case where the defendant has added to the hardship of an unfounded resistance by continuing it to the last. If there were any one case in which we might expect the plaintiff's right to costs to be curtailed, it would be where he has selected the costly procedure of the Superior Courts in suing an unresisting adversary for some paltry demand; yet there it is contended that the statutes are repealed. I think it a more natural construction of the Act to hold that it treats the limiting enactments as still existing in all cases to which their terms apply.

The decision of the Court of Appeal in *Garnett v. Bradley* (2) was pronounced on the 2nd June, 1877, reversing the previous judgment of the Exchequer Division; our Judicature Act passed on the 14th August, 1877, and the House of Lords reversed the decision of the Court of Appeal on the 6th June, 1878. If it were permitted to speculate, it would seem probable from these dates that our statute was intended to preclude all question here by referring to these Acts as "existing," as under the authority of the Court of Appeal they were then believed to be in England, and that the divergence of practice has arisen from the subsequent decision of the House of Lords which changed the course of authority upon the English Act.

Appeal dismissed.

Solicitor for the appellant: *R. H. Todd.*

Com. Pleas.
1880.

Nov. 15.

WOLF v. WALKER.

(By permission, from 14 Ir. L. T. R. 111.)

(Before LAWSON and HARRISON, JJ.)

Practice—Costs—Money Lodged under Order for Security for Costs upon Terms—Tender Before Action without Plea—Acceptancy of Amount lodged—Costs of Action—Order XXX., r. 4—49 G. O. 1854.

A defendant had applied for an order for security for costs, and an order was made on the terms that he should pay into Court a sum he admitted to be due, and stated he had tendered before action as being the entire amount due. He accordingly lodged this sum in Court, and the plaintiff drew out same "in full satisfaction."

Held, defendant was entitled to the costs of the action.

MOTION, on behalf of the defendant, for an order that the defendant's costs of this action should be taxed and paid, and the plaintiff declared entitled to no costs.

The action was commenced by writ for £18 on the 23rd of July, 1880. On the 21st a letter was written by defendant's solicitor tendering £16 8s. The plaintiff's solicitor refused this; and, the plaintiff living in London, a motion for security for costs was made, and came on for hearing on August 17, 1880, before Lawson J., who, on hearing the affidavit of the above facts, made an order that the £16 8s. should be lodged in Court within ten days, and that, on same being so lodged, proceedings be stayed till security for costs given, and in default of such £16 8s. being so paid in, that the motion be refused with costs. The £16 8s. was so lodged, and the following notice therewith served:—"Take notice that I have this day lodged in the Bank of Ireland, &c., the sum of £16 8s. pursuant to the order of Mr. Justice Lawson, of August 17th, 1880, in full satisfaction of plaintiff's claim." The plaintiff drew out the money in full satisfaction of his claim, serving notice to that effect (Form No. 6, App. B., Rules 1877). Plaintiff then claimed to tax his costs up to lodgment, and the Taxing Master held he was entitled to do so.

Orr, in support of the motion:—

The money was paid in under special order. It was never contemplated to deprive us of the right we had then to plead tender,

and pay the money into Court therewith. If we had done so, and plaintiff had drawn out the money in full satisfaction of his debt, we would have been entitled, under 49 General Order, 1854, to have our costs taxed, and these costs would be paid out of the money in Court in the first place.

D. Fitzgerald, for the plaintiff, *contra* :—

They wish to get the advantage of a plea of tender without pleading it. We might have gone on if they had pleaded. No doubt the money was paid into Court under a special order, but it was, nevertheless, paid “in satisfaction,” and that enables us to draw it out “in satisfaction.”

[*LAWSON, J.*—I think it was contrary to my order.]

We are within Order XXX., Rule 4, the words of which are general, and the money was drawn out regularly. We would now offer to waive our claim to our costs, and let them waive their claim to any costs also.

LAWSON, J. :—

We think that it was altogether a breach of this order for the plaintiff to draw the money out of Court as if it had been lodged in the ordinary procedure in satisfaction of the cause of action, and then to go on and take out an order entitling himself to the costs of the action. There is a great deal in what Mr. Fitzgerald says about its being hard upon his client to have to pay all these costs; but it is the plaintiff's own fault. The plaintiff was offered the sum of £16 8s. before action brought, and he chose to go on for a further sum of £1 12s., and to bring an action in the Superior Courts for that. Let it be taken down upon the order that, Mr. Fitzgerald declining to re-lodge the money in Court and give security for costs, the order be made in the terms of the notice; and let the defendant be declared entitled to the costs, but no costs of the present motion.

Order accordingly.

Solicitors for plaintiff: *D. O'Rorke & Son.*

Solicitor for defendant: *Andrew M'Clelland.*

Exchequer.
1880.

Dec. 6.

BRUNKER v. NORTH.

(By permission, from 15 Tr. L. T. R. 10.)

Practice—Costs of Notice Party—O. XV., rr. 18, 21—Judicature Act, s. 53.

A person on whom the defendant had served notice under O. XV., r. 18, obtained liberty to defend the action as to certain causes of action in tort, and the question of his costs was reserved. The jury having found for the defendant on all these causes of action; and the Judge who tried the case being of opinion that no witnesses were called for the defence unnecessarily :—

Held, that the defendant should pay all costs properly incurred by the notice party; and that in ascertaining the defendant's costs of the same causes of action to be paid by the plaintiff, the witnesses called by the notice party should be taken to be witnesses for the defendant.

MOTION on behalf of M. Meade & Son (notice parties), pursuant to leave reserved at the trial, that their costs might be provided for and paid such person or persons as the Court should direct.

The action arose out of injuries sustained by the plaintiff's house in Grafton-street during the rebuilding of the adjoining house belonging to the defendant.

Paragraphs 5 and 6, and also paragraph 9, of the statement of claim stated special contracts by the defendant to protect the plaintiff's house from any injury. Paragraph 10 alleged that the plaintiff was entitled to support for his said house, from the defendant's house, and that defendant deprived the plaintiff of such support. Paragraph 11 stated that the defendant negligently and unskilfully pulled down his house, whereby, &c.; and paragraph 12 was for trespass *q. c. f.*

On 21st February, 1880, an order was made giving the defendant leave to serve a notice under O. XV., r. 18, on M. Meade & Son (the contractors), claiming to be indemnified. On the 27th April, 1880, an order was made under O. XV., r. 21, giving Meade & Son liberty to defend the action as regards the 10th, 11th and 12th paragraphs of the statement of claim, and to appear at the trial by counsel and solicitor, and to call witnesses and cross-examine the plaintiff's witnesses, and that Meade & Son should be bound by the findings on the said paragraphs; that certain amendments should be made in the defence already delivered; that the plaintiff should give Meade & Son like notice of all proceedings

in the action, including notice of trial, as he should give to the defendant; that the question of the costs to be ultimately paid to or by the said Meade & Son should be reserved for the decision of the Judge at the trial and subject to appeal, and that in any event of the action the plaintiff should not be liable for more than one set of costs.

The action was tried before Fitzgerald, B., and a special jury, in November, 1880, and the jury, by direction of the Judge, found for the defendant in respect of the causes of action mentioned in the 10th, 11th and 12th paragraphs of the statement of claim, and, with respect to the remaining causes of action, the jury found for the plaintiff with £900 damages, and the Judge directed the questions between the defendant and Meade & Son to be argued before the Divisional Court.

Serjeant Heron, Q.C., and Andrews, Q.C. (with them *D. Fitzgerald*), for Meade & Son, in support of the motion:—

We were to defend as to lateral support, negligence and trespass. All these have been found for the defendant. We have been acquitted of all blame, and someone ought to pay our costs.

Holmes, Q.C., and Gerrard, for the defendant:—

There is no jurisdiction under O. XV., r. 21, to make the defendant pay the costs of the notice party: *Yorkshire Wagon Co. v. Newport Coal Co.* (1).

[FITZGERALD, B.:—That went upon the ground that the notice party was not bound to come in].

[DOWSE, B.:—In reserving Meade's costs we followed the decision of the Court of Appeal in *Sheridan v. Midland G. W. Ry. Co.* Do you contend that the Judge at the trial had no authority over Meade's costs?].

Yes. The plaintiff was in the wrong in joining the causes of action in tort; he should, therefore, pay all the costs occasioned by these.

[PALLES, C.B.:—We might say that witnesses properly called by Meade should be deemed witnesses for the defendant. (His lordship referred to Judicature Act, s. 53.)]

There would still be two sets of general costs. The defendant's

Exchequer.
1880.

case was not, and could not be, conducted along with Meade's. We submit that the provisions of the Judicature Act as to notice parties have entirely changed the position of a plaintiff.

[PALLES, C.B.:—The plaintiff is entitled to bring an action to try a question at the risk of paying one set of costs if he fails.]

Houston, for the plaintiff:—

We submit we ought not to pay any part of Meade's costs: *Williams v. South Eastern Ry. Co.* (1). More witnesses were called than was necessary.

[DOWSE, B.:—If the defendant had made a complete defence by his own witnesses the case might be different. That depends on the facts.]

PALLES, C.B.:—

We have no difficulty as to the order to be made. Meade was allowed to defend as to the causes of action in tort. He was in substance the person interested in these. No judgment could have been given against him in the action, but he would have been conclusively bound by the finding of the jury. He succeeded completely. *The Yorkshire Wagon Co. v. Newport Coal Co.* (2) has been relied on to show that the notice party is entitled to no costs. I do not think that case well decided. It seems to me to give no effect to the words in O. XV., R. 21—"upon such terms as shall seem just." By section 53 of the Judicature Act the costs of, and incident to, every proceeding in the High Court of Justice are in the discretion of the Court, subject as therein mentioned. If the third parties, having notice, did not come in they would be bound by the issue submitted to the jury, and in the event of collusion between the plaintiff and defendant judgment would go against them by default. In this case we are of opinion that the defendant should pay Meade's costs properly incurred, including the costs of this motion. The defendant contends that he ought to have these costs as well as his own over against the plaintiff. This would be directly contrary to our own order, by which the plaintiff is to pay only one set of costs in any event. *Williams v. South-Eastern*

Ry. Co. (1) shows that a plaintiff is not to be saddled with the extra costs of a third party under such circumstances. There are, however, some costs in fact incurred by Meade, which in substance are costs of the defendant. My brother Fitzgerald is not prepared to say that any of the witnesses called for the defence were unnecessary. The witnesses produced by Meade will, therefore, be treated as witnesses called by the defendant.

Exchequer.
1880.

FITZGERALD, B., concurred.

DOWSE, B.:—

We will not follow the decision of the Queen's Bench Division in England, as it is inconsistent with the decision of the Court of Appeal in this country. As to the second point, no witnesses were called for the defence unnecessarily. This is not to be taken as an authority that if the original defendant made a complete case the third party might go through that *da capo*, and load the plaintiff with the extra costs.

Ordered:—That the defendant do pay to the said M. Meade & Son their costs properly incurred in this action, including their costs of the order of the 27th April, 1880, and of this motion, when taxed and ascertained; and it is further ordered that, in taxing as between the plaintiff and the defendant, the said defendant's costs of the causes of action in the 10th, 11th, and 12th paragraphs of the statement of claim, the costs of any witnesses produced by the said M. Meade & Son in respect of the said causes of action are to be treated as witnesses for the defendant; and that the plaintiff and defendant do abide their own costs of this motion. .

Solicitor for the plaintiff: *J. D. Rosenthal.*

Solicitor for the defendant: *Wm. Hayes.*

Solicitors for Meade & Son: *D. & T. Fitzgerald.*

Exchequer.
1881.

HANNAN v. LAFFAN.

Jan. 18, 26.

(By permission, from 15 Ir. L. T. R. 32.)

(Before PALLES, C.B., and FITZGERALD and DOWSE, BB.)

Practice—Jud. Act, s. 53, sched. r. 22—O. XXI., r. 10—Action and Counter-claim, both established—Form of Judgment—Costs—Distinction between Set-off and Counter-claim.

In an action for assault, the defendant set up a counter-claim on foot of promissory notes made by the plaintiff to the defendant. The jury having found for the plaintiff on the assault with £100 damages, and that the plaintiff was indebted to the defendant in £100 on the counter-claim, and the Judge at the trial having ordered judgment to be entered for the defendant with costs :

The Court set aside this order, and ordered judgment to be entered for the plaintiff in respect of the action of assault for £100 with costs, and for the defendant in respect of the counter-claim for £100 with costs ; that the said sums and costs should be set off against one another, and that the party in whose favour there should be a balance should recover from the other the amount of such balance.

Where the defendant establishes a strict set-off equal to or exceeding the plaintiff's demand, this amounts to a defence to the action, and the plaintiff cannot have judgment. But where the defendant establishes a counter-claim merely (as this does not amount to a defence), the plaintiff is entitled to judgment on his cause of action, and the defendant to judgment on his counter-claim ; these sums will then be set off against one another, and the party in whose favour the balance shall be will have judgment for the amount of such balance. *Chatfield v. Sedgwick*, 4 C. P. Div. 459, discussed.

MOTION, on behalf of the plaintiff, that the judgment directed to be entered for the defendant at the trial of this action should be set aside, and judgment entered for the plaintiff in respect of his claim for £100, and for the defendant in respect of his counter-claim for £100, and the said sums set off against each other, and that the plaintiff should have judgment for his full costs of suit.

The action was for assault. The defendant traversed the cause of action, and by way of counter-claim relied on four promissory notes of the plaintiff, each for £50, due to the defendant. The plaintiff, besides replying specially, joined issue and traversed the making of the notes.

At the trial at the Limerick Summer Assizes, 1880, before Barry, J., and a jury, a verdict was had for the plaintiff on the

claim with £100 damages, and for the defendant on the counter-claim with £100, and the learned Judge directed judgment to be entered for the defendant with costs, reserving liberty to the plaintiff to move.

Exchequer.
1881.

The plaintiff having obtained a conditional order accordingly :

J. Atkinson, Q.C., and *G. Wright* for the defendant, showed cause.

The Jud. Act, sched. r. 22 and O. XXI., r. 10, show there can be only one judgment in the action. Here the plaintiff recovers nothing by his action, so judgment should be for the defendant, and carry costs as usual. It is not contended that a special order as to costs under the Jud. Act, s. 53, should be made in the present case. Where the defendant succeeds he ought to get his costs: *Chatfield v. Sedgwick* (1).

[*PALLES, C. B.*—In *Myers v. Defries* (2) the Court of Appeal in England decided that there may be more than one “event” of an action.]

There was no counter-claim there, and the case merely shows that the defendant gets his costs of the issues found for him, as he used formerly.

[*PALLES, C.B.*—Ought not the judgment to be that the plaintiff is entitled to recover £100 in respect of his action for assault, with the costs; that the defendant is entitled to recover £100 in respect of his counter-claim on the notes, with costs; that the two sums be set off, and execution limited to the difference? Would not that be one judgment? *DOWSE, B.*—You contend that the defendant ought to get the general costs of the cause. If that be right, a man who was owed £100 by another might assault the latter, provided he did not go beyond £100 with it, and the person assaulted could get nothing.]

The plaintiff might have applied to have the counter-claim tried separately.

[*PALLES, C.B.*—It is a strong thing to allow a set-off or money to be paid into Court in an action of assault. It ought not to be extended further than the statute requires. Suppose the plaintiff sued you again for the same assault, what would be your defence?

(1) 4 C. P. Div. 459.

(2), 5 Ex. Div. 180.

Exchequer.
1881.

Judgment recovered. That shows that each matter must be dealt with specifically on the record].

[FITZGERALD, B.—The counter-claim might be for specific performance or an injunction. There would not be a balance then within O. XXI., r. 10].

Original Hartlepool Coll. Co. v. Gibb (1), and *Staples v. Young* (2), were also cited (3).

W. O'Brien, Q.C. (*Peter O'Brien, Q.C.*, and *Cleary* with him), for the plaintiff, *contra*. In *Chatfield v. Sedgwick* (4) the plaintiff was not entitled to any costs, as the amount found due to him was less than £20. In *Cole, Marchant, & Co. v. Firth* (5), the Court ordered the defendant to pay the costs of the plaintiff's claim, and the plaintiff to pay the costs of the defendant's counter-claim. A counter-claim must be distinguished from a strict set-off of mutual debts: *Neale v. Clarke* (6), *Mason v. Brentini* (7) (following *Saner v. Bilton*) (8), was the converse of the present case. Both claim and counter-claim were dismissed with costs, and the plaintiff had to pay the general costs of the action, and the defendant only the amount by which the costs had been increased by reason of the counter-claim. *Stooke v. Taylor* (9) is in our favour.

[PALLES, C.B.:—Judgment for the defendant would be that he go thereof without day. Why should that be when there is £100 against him? As to the general costs of the action, I doubt if that is properly before us].

Atkinson, Q.C., in reply :—

The judge at the trial made an order giving us the costs, and you are asked to set that aside without reason assigned.

[FITZGERALD, B.—As the judge states no reasons we must assume he acted on the ordinary case].

The counter-claim cannot be treated merely as an issue in the original action. The defendant might have brought a separate

(1) L. R. 5 Ch. D. 713.

(2) L. R. 2 Ex. D. 324.

(3) And see *Baines v. Bromley*, 6 Q. B. D. 197—Rep.

(4) 4 C. P. Div. 459.

(7) 15 Ch. Div. 287.

(5) 4 Ex. Div. 301.

(8) 11 Ch. Div. 416.

(6) 4 Ex. Div. 286.

(9) 5 Q. B. Div. 569.

action on the notes, and got the costs of it. To make him pay the general costs now would be to put a fine on him for having availed himself of the provisions of the Judicature Act. The order suggested would be contrary to *Chatfield v. Sedgwick*.

[PALLES, C.B.—There the order of reference seems to have contemplated only one event].

Our £100 ought to be treated as a set-off, or as paid into Court; in either case we would be entitled to judgment, and to the costs of the action.

[DOWSE, B.—There can be no set-off against unliquidated damages. PALLES, C.B.—Money paid into Court could be drawn out by the plaintiff].

PALLES, C.B. :—

The only question now before us is, how judgment ought to be entered. We are not at present concerned with the result of the taxation of costs on that judgment. The first action was for assault, and the jury found a verdict for the plaintiff, with £100 damages. I am of opinion that the plaintiff is entitled to have it appear on the record that he has recovered £100 damages for assault, and that this must be so in the interest of the defendant himself, that he may have the defence of judgment recovered to a second action by the plaintiff for the same assault. As to the counter-claim on the promissory notes, it equally follows that there must be an adjudication on the record in respect of this.

As to costs, section 53 of the Judicature Act provides that the costs of every action, question, and issue tried by a jury shall follow the event, unless, upon application made, the Judge at the trial or the Court shall, for special cause shown and mentioned in the order, otherwise direct. The learned Judge did not make an order to the contrary, nor do we propose to do so.

Myers v. Defries (1) is a decisive authority that where two unconnected and independent causes of action are tried together the word “event” in the section must be read distributively. *Myers v. Defries*, indeed, goes further than is necessary for the decision of the present case, for there both the causes of action were brought by the plaintiff.

Exchequer.
1881.

Accordingly, I am of opinion that the judgment should be somewhat in this form:—Therefore, it is considered that the plaintiff ought to recover £100 damages in respect of this action for assault, with costs, and that the defendant ought to recover £100 in respect of his counter-claim, with costs. It will be for the Taxing Officer to ascertain what these costs are on each side.

Now, these judgments are not final, but interlocutory, and we have used (1) the words “ought to recover,” not “shall recover.” But by the Judicature Act final judgment is to be entered according to the result of all the questions. The order will, therefore, direct that the lesser of these sums, when ascertained, shall be set off against the greater, and that execution be limited to the difference.

One word as to the cases cited. Many may be put out of the question at present, as they arose on review of taxation. Mr. Atkinson says our decision is opposed to *Chatfield v. Sedgwick*. That turned on the meaning of the word “event,” not in the section of the Judicature Act, but in a reference under the arbitration clauses of the C. L. P. Act. Moreover, the counter-claim was for a balance on accounts between the parties. Under the statute of set-off that amounted to a defence to the action; and where a defence to the action is proved, of course, the plaintiff cannot have judgment. But if it be not matter of set-off, but strictly a counter-claim, and the plaintiff establishes his cause of action, he must have judgment.

FITZGERALD and DOWSE, BB., concurred.

Ordered:—That the plaintiff do recover from the defendant £100 damages in respect of the cause of action in the statement of claim, with costs; and that the defendant do recover from the plaintiff £100 in respect of the cause of action in his counter-claim, with costs; that the said sums and costs so recovered shall be set-off one against the other; and that the party in whose favour there shall be a balance shall recover from the other the amount of such balance. The plaintiff to have the costs of this motion.

Solicitor for plaintiff: *J. Dundon.*

Solicitor for defendant: *J. Ryan.*

(2) But compare the form of order given at foot, which was settled by the Court—
Rep.

In re **MERCHANT SHIPPING ACT, 1854; Ex parte**
ALLEN.

V.-Chancellor.
1881.

Feb. 28.

(By permission, from 7 L. R. Ir. 124).

8 Vict., c. 18, s. 80—*Entailed Lands Compulsorily Taken—Purchase Money Lodged in Court and Invested—Disentailing Deed—Petition for Transfer out of Funds—Costs—Taxing Master.*

Upon a petition for the transfer to the petitioner of funds lodged in Court as the purchase money of lands taken by Commissioners under their compulsory powers, of which lands the petitioner was tenant in tail in possession, the Court refused to direct that the costs of a deed disentailing the funds in Court were payable by the Commissioners.

Semble, the Court will not specify what costs are properly payable within the 80th section of the Lands Clauses Consolidation Act, 1845, but will leave all questions on that point to the decision of the Taxing Master in the first instance.

PETITION, praying for a transfer to the petitioner of the sum of £272 1s. 2d. Government New Three Per Cent. Stock standing in Court to the credit of the matter, and that the Commissioners of Irish Lights might be ordered to pay to the petitioner the costs of the petition and all the costs incurred consequent thereon, pursuant to the provisions of the Lands Clauses Consolidation Act, including the costs of a disentailing deed of the 26th January, 1881.

Christopher Allen, by his will, dated the 31st October, 1862, devised to Charles Frederick Allen and Henry Jones all his real estate upon trust, subject, as therein mentioned, to the use of his eldest son, the petitioner, and the heirs of his body lawfully issuing, with remainders over. The testator died on the 24th of October, 1866, and his will was duly proved.

Under the provisions of the Merchant Shipping Act, 1854, which incorporated the Lands Clauses Consolidation Act, 1845, the Commissioners of Irish Lights were empowered to take and purchase any lands which might be necessary for the purpose of erecting new light-houses; and they duly gave notice to Charles Frederick Allen and Henry Jones that they required a piece of land, part of the lands so devised by the aforesaid will.

The sum of £250 was duly settled by agreement as the amount to be paid as the purchase money for the said land; and, on the

V.-C. Court.
1881.

7th of May, 1873, the Commissioners of Irish Lights paid the sum of £250 into the Bank of Ireland, in the name and with the privity of the Accountant-General of the Court of Chancery, to the credit of the matter, which sum of £250 was, upon the petition of Charles Frederick Allen and Henry Jones, afterwards invested in the sum of £272 1s. 2d. Government New Three Per Cent. Stock, which was transferred to the credit of the matter. The petitioner attained twenty-one on the 24th of August, 1876, and by an indenture, dated the 26th of January, 1881, he disentailed the said sum of £272 1s. 2d. Government New Three Per Cent. Stock.

There were no incumbrances affecting the Stock, and there was no question as to the right of the petitioner to the fund, or as to his being entitled to the general costs of the petition and the proceedings thereunder against the Commissioners.

Mr. J. C. Lane, for the petitioner:—

That the disentailing deed was necessary is shown by *In re Limerick and Ennis Railway Co., ex parte Smyth* (1). Under the 80th section of the Lands Clauses Consolidation Act, 1845 (8 Vict., c. 18), the petitioner is entitled to be paid all costs, except those caused by adverse litigation. *In re Devisees of Nicholas Brooking v. The South Devon Railway Co.* (2) is an authority that the costs of a disentailing deed should be paid by the Company. In *Ex parte Vaudrey* (3) it was held that even the costs of an unsuccessful attempt to invest the moneys paid in must be paid by the Company. In the form of decree given in “*Seton on Decrees*,” p. 1,441 (4th edition), the costs to be paid by the Company are specified, and the only costs not there specified are those caused by adverse litigation.

Mr. Robertson, for the Commissioners of Irish Lights, said that, in a recent petition matter before the Master of the Rolls, where a deed disentailing the funds in Court had been executed, His Honor refused to direct the costs of the deed to be allowed upon the ground that, whether these costs should be allowed or not, it was a question for the Taxing Master. He submitted that this was

(1) Ir. R. 10 Eq. 66.

(2) 2 Giff. 81.

(3) 3 Giff. 224.

the more convenient practice, as otherwise the Company would always be compelled to appear in Court in cases of the kind to see whether the deed was properly framed and confined to the fund in Court.

V.-C. Court.
1881.

The VICE-CHANCELLOR:—

I think the course adopted by the Master of the Rolls is a convenient one, and that it ought to apply to all cases in which general costs are given. The only thing which the Court should do is to adhere to the words of the section, and the Taxing Master will then decide what costs are properly incurred, and if he goes wrong the parties aggrieved can have his taxation reviewed. In my opinion, a great deal of mischief is caused by giving special directions as to particular costs in a case, because then, if in any other case a special direction is not given as to similar costs, the Taxing Master will think that he should not allow them without an order. I shall make the order in the usual form.

Solicitors for the petitioner: *Messrs. Thomas Exham & Son.*

Solicitors for Commissioners of Irish Lights: *Messrs. T. & D. Fitzgerald.*

EAGER v. BUCKLEY; DEVITT v. BYRNE.

(By permission from 8 L. R. Ir. 99; s. c. 15 Ir. L. T. R. 60.)

Queen's Bench.
1881.

March 1.

(Before the FULL COURT.)

[These two cases were heard together, the facts being similar.]

Practice—Costs—Judgment by Default—Costs of Motion to Substitute Service.

Where a defendant upon whom service was substituted allowed judgment to go by default:—*Held*, that the plaintiff in marking judgment was entitled to add to the sum allowed by Order VIII. Rule 2 (April, 1878), the taxed costs of the motion to substitute service.

THESE were actions for rent, and judgment had been allowed to go by default. It appeared the plaintiffs had obtained orders to substitute service of the writ of summons, and the costs of the first action on taxation were ascertained to be £12 15s. On marking

Queen's Bench. judgment, the Master of the Court refused to allow more than
1881. £4 6s. costs to be added to the debt, stating that under Order VIII., Rule 2, of April, 1878, no more could be allowed.

Hewson and *William Kenny*, for the plaintiffs, argued that this rule did not provide for the present case, and referred to the repealing Rule 2, Order II., of June, 1879, as showing this by analogy. They contended also that under Rule 29 of Order X. (April, 1878), the practice under the Common Law Procedure Act of 1853, section 34, was to be continued, which provides that in such cases the taxed costs should be included in the judgment.

The Court held the plaintiffs entitled to have the taxed costs of the motion added to the amount of the judgment, and intimated that for the future the practice as to this matter was to remain as it had been under the old system.

There was no appearance for the defendants.

Co. Court.
1881.

BELL v. M'NALLY.

(By permission, from 16 Ir. L. T. R. 11.)

Dec. 29.

(Before R. W. GAMBLE, Esq., Q.C.)

Practice—Costs—Fee for Instructions to Plaintiff's Solicitor prior to Entry of Civil Bill.

Where the amount sued for by an ordinary civil bill is tendered before the entering of the civil bill, the plaintiff's solicitor is entitled to payment of the prescribed fee for instructions.

THIS was a Civil Bill to recover £15 19s. 11d. for the use and occupation of defendant's holding under the plaintiff. The rent was admitted to be due, and was tendered with certain costs to plaintiff's solicitor two days before the entry of the civil bill. The payment was refused on the ground that the costs did not include the fee for instructions, which is set out in the schedule prior to the fee for entry. On the question whether this fee is properly chargeable, the case came before the Court.

Mr. R. A. Mullan, solicitor, for the plaintiff.

Mr. A. Gartlan, solicitor, for the defendant.

The JUDGE held that the plaintiff's solicitor was entitled to charge as against the defendant the fee for instructions before the entry of the civil bill, on the ground that it was reasonable, as it was necessary that a solicitor should have instructions to ascertain whether or not the case was one in which a civil bill should be issued, and the fees were graduated in proportion to the sum claimed, and without the fee for instructions the remuneration to the solicitor would be insufficient.

Co. Court.
1881.

GREVILLE v. KIRK.

(By permission, from 10 L. R. Ir. 41.)

Com. Pleas.
1882.

Feb 10.

(Before LAWSON and HARRISON, JJ.)

Costs—Ejectment—Overholding Tenant—Joinder of Claim for Mesne Rates—Land Law (Ireland) Act, 1881, Sect. 51—County Court Jurisdiction.

An action was brought in a Division of the High Court of Justice to recover possession of lands on the expiration of a lease for thirty-one years at a yearly rent of £40, under which the lands had been held, the writ of summons being issued before the passing of the Land Law (Ireland) Act, 1881. By his statement of claim, delivered in October, 1881, the plaintiff claimed to recover possession and mesne rates. A consent for judgment for possession and a sum for mesne rates was given by the defendant.

Held, that the action for possession and mesne rates might have been brought in the County Court; and that the plaintiff was, therefore, by sect. 51 of the Land Law (Ireland) Act, 1881, disentitled to costs.

MOTION, on behalf of the plaintiff, for an order that the Taxing Master should proceed to tax the plaintiff's costs.

The action was brought to recover possession of certain lands in the County of Longford, held under lease dated the 21st of February, 1851, for a term of thirty-one years, at a yearly rent of £40, and made between Richard Greville, whose interest vested in the plaintiff, and John Burn Kirk, whose interest in the lease became vested in the defendant Anne Kirk. The lease expired on the 25th of March, 1881.

The writ of summons was issued before the passing of the Land Law (Ireland) Act, 1881; and on the 25th of October, 1881, the plaintiff delivered his statement of claim, by which he claimed

Com. Pleas.
1882.

possession of the lands, and £50 for mesne rates. On the 28th of November the defendant delivered her statement of defence, and issue was joined. Notice of trial was served, but on the 15th of December, 1881, the defendant gave a consent for judgment for possession of the lands and £27 for mesne rates, which consent was made a rule of Court. Possession was delivered to the plaintiff on the 3rd of January, 1882. The defendant remained up to that date in possession, after the expiration of the lease. The plaintiff having lodged his costs for taxation, the Taxing Master deferred taxing them pending a case in the Exchequer Division, in which it was supposed that the question as to the effect of the 51st section of the Land Law (Ireland) Act, 1881, would be raised for decision. The question, however, was afterwards argued before the Taxing Master, who, upon hearing the argument, was of opinion that, as the action might have been brought in the County Court, the plaintiff was not entitled to any costs, and refused to tax the costs accordingly.

The plaintiff thereupon served notice of the present application, which, having come on to be heard before Harrison, J., sitting to hear motions, was directed by his Lordship to stand for the Divisional Court.

Faloon, in support of the motion :—

The question here arises upon the 51st section of the Land Law (Ireland) Act, 1881. The opinion expressed by Palles, C.B., in *Kearney v. Cahill* (1), which will be cited on the other side, does not apply. In that case the rent was under £20. In this case the action is for over-holding on the expiration of a lease, and the yearly rent is £40, and it was commenced two months before the Land Act was passed. The point was not practically discussed, as the application was made *ex parte*, and the Lord Chief Baron only granted a conditional order. The case does not seem to have gone further. *Cassidy v. Loughlen* (2) was decided on the retrospective operation of a statutory provision with respect to procedure. *Wright v. Hale* (3) also turned upon an enactment purely relating to procedure. The distinction between statutes altering procedure merely, and those interfering with vested rights, must, no doubt, be admitted.

(1) 15 Ir. L. T. R. 512.

(2) 4 L. R. Ir. 731.

(3) 6 H. & N. 227.

But assuming that the right to costs depends upon whether the action could be brought in the County Court, the general jurisdiction as to ejectment, "the determination of disputes and differences respecting the possession of land held under leases," extend only to a rent not exceeding £30 (14 & 15 Vict. c. 57, s. 79; 40 & 41 Vict. c. 56, s. 53), and these provisions were really applicable only to actions between persons claiming the lessee's interest. The jurisdiction of the County Courts to entertain ejectments for over-holding was given by the 23 and 24 Vict. c. 154; but although the jurisdiction so conferred extends to lands let at any rent up to £100 a year, the section applies to the recovery of the lands, and nothing else. The power of the County Court Judge, then the Chairman of the County, was to "Decree the landlord to be put into possession of the said premises." Nothing is said about mesne profits where they have accrued after the determination of the lease. The jurisdiction of the County Court is statutory, and it could not effectually assume any jurisdiction beyond the express language of the section. Therefore, if the plaintiff sued in the County Court, he must have brought two actions there—one for possession, another for mesne rates. This action was commenced before the alteration in the law effected by the 51st section of the Act of last Session. The writ of summons commences the action: *Moore v. Alwill* (1), in which the Exchequer Division did follow *Large v. Large* (2). The consent for judgment entitles a plaintiff to costs as much as if he had obtained a verdict: *Dalbiac v. Delacour* (3).

T. L. O'Shaughnessy, for the defendant:—

The County Court would have had jurisdiction in this case: see the 72nd section of the Landlord and Tenant Act, 1860. There is no ground for the contention that a claim for mesne rates cannot be made in a civil bill ejectment. Order II. of the County Courts (1877), Rule 10, dealing with the joinder of causes of action in the County Courts, provides that no cause of action shall be joined with an action for the recovery of land, except claims for mesne rates or arrears of rent in respect of the premises sought to be recovered, thus contemplating the joinder of such

(1) 8 L. R. Ir. 245. (2) W. N., 1877, p. 198. (3) L. R. 10 Exch. 210.

Com. Pleas.
1882.

causes of action in a civil bill ejectment. This was, therefore, an action in which the plaintiff could have sued and recovered all that he was entitled to in the County Court. In such a case, section 51 of the Land Law (Ireland) Act, 1881, is express that the plaintiff, if he elects to sue in the Superior Court, shall not be entitled to costs unless the Judge at the trial or the Divisional Court otherwise direct. No special case is attempted to be made here to justify the Court in departing from the general rule of the statute.

LAWSON, J. :—

The action for the recovery of the land in this case is one which could have been brought in the Civil Bill Court; but it has been contended that the joining a claim to recover mesne rates takes the case out of the provision in the statute disentitling the plaintiff to costs. I am not aware of anything to prevent the plaintiff in the Civil Bill Court from claiming mesne rates by his ejectment, and the rule to which we were referred seems to contemplate it.

There is a discretion vested in the Court to give costs under special circumstances, but we are not asked to exercise that discretion. This is an ordinary case of an ejectment, which might have been brought in the Civil Bill Court, and we must, therefore, refuse this motion, which asks for a direction from the Master to tax the costs.

HARRISON, J. :—

I am of the same opinion. I allowed the matter to stand over as involving a point of some consequence under the recent Land Act. I consider the Master's decision was right. The question is, could the plaintiff have sued for the recovery of the land sought to be recovered in this action in the Civil Bill Court? There is no question he could. It is true he brings a claim for mesne rates; but the Rules of the Civil Bill Court show that he could have joined a similar claim in his ejectment proceedings in that Court. If so, the case is clearly within the provisions of the 51st section of the Land Law (Ireland) Act, 1881.

Motion refused.

Solicitor for the plaintiff: *J. Wilson, junior.*

Solicitor for the defendant: *L. M. Fleming.*

SCULLY v. MANDEVILLE.

(By permission, from 10 L. R. Ir. 327.)

Q. B. Div.
1882.

Nov. 8.

(Before MAY, C.J., and LAWSON, J.)

Land Law (Ireland) Act, 1881.—The Landlord and Tenant Law, Amendment, Act (Ireland), 1860—Writ of Restitution—Costs when rent is under £100 per annum.

When a holding at a rent under £100 per annum has been evicted for non-payment of rent, the tenant or other party having a specific interest in the holding is entitled to a writ of restitution, under 23 & 24 Vict., c. 154, without paying the costs of the action.

THIS was an application by the defendant that on her lodging in Court to the credit of the action the sum of £83 11s., being the amount of the rent sued for, and arrears, up to the date of the execution of the *habere*, an order might issue to restore the defendant to the possession of the lands.

It appeared from the affidavit of the defendant that she was served with a writ of summons in ejectment for non-payment of £55 0s. 8d., one year's rent of part of the lands of Mullough, in the County of Tipperary, and that she not having entered an appearance, judgment had been marked in the action by default for possession of the lands. The amount endorsed upon the writ of *habere* was £55 0s. 8d. for rent due out of the lands, together with the sum of £10 15s. 1d. for the costs of the plaintiff. The defendant, two days previous to the hearing of the application, lodged in Court the sum due for rent without costs.

A. Cleary, for the defendant :—

We are entitled to redeem on payment of the rent, without costs: section 71 of the Landlord and Tenant Act of 1860, and section 51 of the Land Law (Ireland) Act, 1881. The landlord is not entitled to any costs of an action of ejectment for non-payment of rent which he brings in the Superior Courts when the Civil Bill Court would have jurisdiction. In this case the Civil Bill Court had jurisdiction, the rent being under £100.

Queen's Bench.
1882.

John Murray, for the plaintiff:—

By the 70th and 71st sections of the 23 & 24 Vict., c. 154, the tenant, or person having a specific interest in the tenancy, must pay the rent, arrears thereof, with full costs, or lodge the same in Court within six months after the execution of the *habere*, in order to redeem. These costs are not personal costs. In this case judgment was obtained for default of appearance, and therefore the judgment was only for the possession. This would have been the case, no matter what the amount of the rent. The Land Law (Ireland) Act, 1881, therefore does not apply; the plaintiff does not seek any costs or other relief, the action is at an end, and the judgment executed. It is the defendant who seeks relief. The tenant is obtaining in a summary way the relief which formerly would be the subject of a redemption bill in equity. In such cases the landlord was indemnified, and got solicitor and client costs. In order to recover costs a separate action should be brought. By the rules of Court the judgment is *in rem*—merely for possession; no costs are given. It is, therefore, clear that the costs are not necessarily those given in the action. This is made manifest from the fact that a mortgagee or other party having an interest in the premises, although not a party and not served, could apply for restitution. The defendant can have the costs taxed; the amount is large, because the writ had to be served by posting on the police station, under the Rules of 27th December, 1881. The granting of the restitution is discretionary with the Court, and the fact that the writ had to be so served is an additional reason for making the tenant pay the costs. In any event the defendant should pay the costs of the motion: *O'Farrell v. Cloran* (1), where the form of the order is given.

MAY, C.J.:—

It is provided by the 51st section of the Land Law (Ireland) Act, 1881, that “Whenever an action . . . for the recovery of land, whether for non-payment of rent or for overholding, is brought in the High Court of Justice in Ireland, in any case in which the plaintiff in such action could have sued for the recovery of such land in a Civil Bill Court, the plaintiff in such action shall

(1) I. R. 5 C. L. 442.

not be entitled to any costs unless the Judge before whom such action is tried, or the Divisional Court to which such action is attached, shall by order declare the said plaintiff entitled to costs.” *Queen's Bench.*
1882.

The defendant in this case contends that she is entitled to restitution of her holding on paying the rent and arrears, without any costs, it being admitted that the case falls within this Act, and we think she is so entitled. It is true that under previous statutes an evicted tenant applying for restitution was obliged to lodge in Court “the rent and arrears thereof and full costs.” But in the present case the Act of 1881 has provided that the plaintiff, the lessor, shall not be entitled to costs, and it seems clear that no costs being due none should be lodged.

LAWSON, J. :—

The plaintiff in this case insists that the defendant is bound, in order to redeem the evicted lands, to lodge the costs in addition to the rent. He has furnished a bill of costs, and it is argued that the amount of those costs, when taxed, should be lodged in Court. But the Land Act provides that, where an ejectment is brought in the Superior Court which might have been brought in the County Court, the plaintiff shall not be entitled to any costs: that is this case. Judgment was obtained by default, and there is no judgment for costs. Costs can only flow from the judgment of the Court; here there could be no such judgment, as the Act of Parliament deprives plaintiff of costs.

Solicitor for the plaintiff: *Cavanagh.*

Solicitors for the defendant: *O’Riordan and Mandeville.*

Assizes,
1883.

July 11.

SIMPSON v. WILSON.

(By permission, from 17 Ir. L. T. 546.)

(Before PALLES, C.B.)

Practice—Costs—Civil Bill—Amount sued for greater than sum recovered.

CIVIL BILL APPEAL.—The appellant, Simpson, had been solicitor for the plaintiff in the case of *Wilson v. Devlin* in the Armagh County Court, in which the plaintiff had sued for £50 damages, but obtained a decree for only £15, from which he had appealed, when the amount was increased to £35. Mr. Simpson then furnished his bill of costs to Wilson, who refused to pay the amount claimed according to the Schedule of Fees, as on the £35. Accordingly, Mr. Simpson took proceedings against Wilson, seeking to recover £2 12s. 6d. The County Court Judge granted a decree for only £1 17s. 6d., as upon the amount for which he had given the decree in *Wilson v. Devlin*, and as payable thereon as between attorney and client.

PALLES, C.B., held that the appellant was entitled to fees on the original sum sued for (£50), according to the Schedule of Fees, and not on the amount *recovered*, whether in the Civil Bill Court or on appeal, but observed that, as a check against filling up civil bills for excessive amounts, the Court would exercise a discretion, considering whether or not the amounts claimed were reasonable and right and in accordance with the instructions received from the clients.

*In re BECK; In re CARTINGTON ESTATE.**Vice-Chan.*
1883.*(By permission, from 24 Ch. Div. 608; s. c 31 W. R. 910; 49 L. T. 95; 52 L. J. Ch. 815.)*

July 31.

Settled Land Act, 1882—Sale by tenant for life—Solicitors' Remuneration Act, 1881—General Order—Solicitors' remuneration in respect of business connected with sales—Auctioneer's charges.

Settled property which had been put up for sale by auction by the tenant for life under the Settled Land Act, 1882, but withdrawn for want of any sufficient offer, having been sold by private contract on the same day :—

Held, on summons by the trustees for the decision of the Court, that one charge, according to the scale set out in Part I. of Schedule 1 of the General Order under the Solicitors' Remuneration Act, 1881, was payable out of the purchase-money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducing the title and completing the conveyance, including the preparation of the contract; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase-money.

ADJOURNED SUMMONS for the purpose of obtaining the direction of the Court as to payment of costs of a sale of settled property by the tenant for life under the Settled Land Act, 1882.

In January, 1883, W. A. Beck, the tenant for life under the will of Thomas A. Beck, of the Cartington estate, with the concurrence of his mortgagees, advertised the Cartington estate for sale by auction under the provisions of the Settled Land Act, 1882.

At the auction the property was withdrawn, no sufficient offer being made, but it was, on the same day, shortly after the attempted auction, sold by private contract, through the instrumentality of the auctioneer, for £37,500. Previously to putting up the property for sale by auction it was arranged between the vendor's solicitors and the auctioneer that the solicitors should draw the advertisements, conduct the advertising, prepare the particulars, and superintend the preparation of the plans, and that the auctioneer should receive one-quarter per cent. on the purchase-money if the property was sold at the auction or afterwards through his agency.

Questions having arisen as to the payment of the costs and charges of the sale, this summons was taken out on behalf of the trustees (and adjourned into Court), asking that they might be at

V.-C. Court,
1883.

liberty, out of the proceeds of the sale of the estate, to pay the solicitors of the tenant for life a commission for conducting the sale of the Cartington estate by public auction, including the conditions of sale, and also a commission for deducing the title thereto, and perusing and completing the conveyance thereof, according to the scale set out in Part I. of the 1st schedule of the General Order under the Solicitors' Remuneration Act, 1881, and also be at liberty to pay to the solicitors of the mortgagees of the tenant for life their proper charges in connection with the sale, according to the scale set out in the 2nd schedule of the same order, and also be at liberty to pay or retain the proper charges of their (the applicants') solicitors in connection with this matter according to the last-mentioned scale.

Wolstenholme, for the trustees :—

The attempted auction and actual sale by private contract were really one transaction, and the solicitors for the tenant for life are therefore entitled to one commission only for conducting the sale and for deducing title to the property and perusing and completing conveyance, and not to commission on the reserved price, and also to one-half of the commission for negotiating the sales according to Rule 2 of the 1st schedule of the General Order under the Solicitors' Remuneration Act, 1881. They are not entitled to repayment of the auctioneer's commission of one-quarter per cent. as by the General Order, Rule 4, the remuneration prescribed by Schedule I. to the order "is not to include auctioneer's or valuer's charges." The costs occasioned by the concurrence in the sale by the mortgagees must be paid by the tenant for life. Under the old practice the trustees would have been the persons selling, and the expenses of the mortgagees, whose concurrence in the sale was necessary, would have been paid out of the capital, but this rule no longer applies.

Shebbeare (Hemming, Q.C., with him) for the tenant for life :—

By the Settled Land Act, 1882, section 53, the tenant for life, in exercising the powers of the Act, is in the position and clothed with all the powers and duties of a trustee; and by section 21 (x.) capital money arising under the Act may be applied in payment of

costs, charges, and expenses of or incidental to the execution of the powers given by the Act. The vendor is therefore entitled to receive out of the purchase-money the costs and charges mentioned in the summons—*i.e.*, the commission for conducting the sale and commission for deducing the title and completing the conveyance—and, under Rule 5 of Schedule 1 of the General Order, to the charges occasioned by the concurrence of the mortgagee's solicitor. We also submit that although by Rule 4 the remuneration prescribed by Schedule I. does not include auctioneer's charges, the vendor's solicitors should be allowed these charges, which have been paid by them pursuant to the arrangement made previously to putting up the property for sale.

V.-C. Court.
1875.

BACON, V.C., holding that the attempted sale by auction and the actual sale by private contract must be treated as one transaction, directed that the trustees were to be at liberty to pay out of the purchase-moneys one commission for conducting the sale, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance according to the scale of charges contained in Schedule 1, Part I., to the General Order under the Solicitors' Remuneration Act, 1881, and also the costs occasioned by the concurrence in the sale of the tenant for life's mortgagees. The trustees were also to be at liberty to pay out of the purchase-moneys a proper sum to the auctioneer for his charges, which had been paid by the tenant for life, in addition to the scale payable to the solicitors.

MINUTES OF ORDER.—Let the applicants be at liberty, out of the proceeds of sale of the above-mentioned *Cartington* estate, to pay Messrs. *H. & M.*, the solicitors of the tenant for life, *W. A. Beck*, his costs of the sale, on the principle that there is to be one charge according to the scale set out in Part I. of the 1st schedule of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, for conducting the sale of the above-mentioned *Cartington* estate by public auction, including the conditions of sale, and one other charge, according to the same scale, for deducing the title to the said *Cartington* estate, including the preparation of contract for title. And let the applicants be at liberty thereout also to pay to Messrs. *J. H. & P.*, the solicitors of the mortgagees of the said tenant for life, their proper charges in connection with the said sale according to the old system as altered by the 2nd schedule to the said order. And let the applicants be at liberty thereout also to pay to the auctioneers a commission of one-quarter per cent. on the amount of the purchase-money of the said estate for their charges of the sale.

V.-C. Court. 1883. And let them also be at liberty to pay or retain the proper charges of Messrs. M. D. & Co., their solicitors, in connection with this matter according to the scale set out in the 2nd schedule to the said General Order. Costs of all parties of this application to be taxed and paid and retained by the applicants out of the said proceeds of sale.

Solicitor: *Mills, Dowson & Co. ; Johnston, Harrison & Powell*, agent for *Harrison & Milne*, Kendal.

Court of App.
1883.

In re LACEY & SON.

(By permission, from 25 Ch. D. 301; s. c. 32 W. R. 233; 49 L. T. 755; 53 L. J. Ch. 287)

V.C.,
Nov. 17.
C.A.,
Dec. 12, 13.

Solicitor's charges—Taxation—Pressure—Rules under Solicitors' Remuneration Act, 1881 (44 & 45 Vic., c. 44)—Percentage.

A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th March, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd of February, 1883, the vendor's solicitors sent in their bill of costs, in which they charged 30s. per cent. on the purchase-money of each lot, considering that this was the proper charge under Schedule I. to the general rules under the Solicitors' Remuneration Act, 1881, which provides that amount of remuneration to a vendor's solicitor "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)." The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th of February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill. *Held*, by BACON, V.C., that an order must be made for taxation of the bill with a direction that the taxation should be on the old system prevailing before the Solicitors' Remuneration Act, 1881:—

Held, on appeal, that the case was governed by the new Rules, but that the bill was framed on an erroneous footing, for that the *ad valorem* remuneration authorised by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed—viz., the deducing title and perusing and completing conveyance—was done; that here, as there was no deducing of title, but only perusal and completion of the conveyances, Schedule I. did not apply, but that under the General Order, rule 2 (c), the solicitor's remuneration was to be regulated by the old system as modified by Schedule II.

But *held*, that having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorise taxation after payment.

By an agreement, dated the 19th of December, 1881, between A. H. Parken, thereafter called the lessor, and C. A. D. George, thereafter called the lessee, it was agreed that, as soon as the lessee should have erected and covered in certain houses on the piece of land therein mentioned, the lessor should grant him a lease of it for ninety-nine years from the 29th September, 1881, at the rent therein mentioned, payable on the four usual quarter days. It was provided that this lease should contain an agreement that if the lessee, his executors, administrators, or assigns, should at any time within the first five years of the demise give the lessor notice in writing of his or their intention to purchase the reversion in fee simple at the price of £2,205, then the person or persons giving such notice should purchase the reversion at that price, subject to the conditions thereafter contained, among which were the following:—"1. The purchase-money shall be paid and the purchase completed on such one of the quarterly days hereby appointed for payment of rent as shall happen next after the end of three calendar months from the date of such notice. 3. Upon payment of the purchase-money and all arrears of rent at the time aforesaid, the vendor shall execute a proper conveyance of the said premises to the purchaser, to be prepared by and at the expense of the purchaser, and shall contain the like covenants on the part of the purchaser as are hereinbefore contained on the part of the lessee to pay the expense of maintaining and keeping in repair the said road, sewer, and footway, and not to erect any additional building, wall, or fence, or make any alterations in the plan or elevation of the said messuages and premises without licence of the vendor, nor carry on any trade or business, or do any act which may be an annoyance or disturbance to the vendor or his tenants or the neighbourhood. The person or persons to whom such conveyance shall be made shall execute and deliver to the vendor a duplicate of the said deed of conveyance, such duplicate to be prepared by the solicitor of the vendor, and the costs thereof and all other costs of the vendor of and attending the said purchase, or incidental thereto, including the abstract of title, shall be borne by the purchaser. 4. The vendor shall within one calendar month from the date of such notice as aforesaid deliver to the purchaser or his solicitor an abstract of the vendor's title

Appeal.
1883.

to the said premises, such title to commence with an indenture of conveyance to the vendor dated the 19th of October, 1881, and the purchaser shall make no objections or inquiry as to the earlier title."

By a subsequent agreement the terms of this agreement were varied, and the purchase-money was increased to £2,362 10s.

In December, 1882, George gave two notices of his intention to purchase, one notice relating to part of the property and the other notice to the remainder. The solicitors of George gave notice to Messrs. Lacey & Son, the solicitors of Parken, that no abstracts of title would be required, and the draft conveyances were forwarded for perusal on the 29th of December, 1882. The length of each was about twenty-eight folios. The time for completion was the 25th of March, 1883, but at the purchaser's request the completion was arranged to take place about six weeks earlier.

The rules under the Solicitors' Remuneration Act, 1881, came into operation from and after the 31st of December, 1882.

On the 2nd of February Lacey & Son sent to George's solicitors an account of what George would have to pay on completion, including the following item:—

"Our costs, as per other side, and stamps paid for
you - - - £50 10s."

Adding the note, "Your conveyances being unstamped, we have had to stamp them and to get denoting stamps affixed."

The account of costs was as follows:—

"MESSRS. LACEY & SON'S CHARGES.

"Parken to George.

		£ s. d.		
"1883. Feb. 2.				
"As to conveyance of plot for £1,125	-	16	10	0
"Perusal on behalf of Mrs. Rotton and Mr. Dwarris		2	0	0
"Stamp on conveyance	- - -	5	15	0
" „ duplicate	- - -	0	5	0
"As to conveyance of plot for £1,237 10s.	- - -	17	10	0
"Perusal on behalf of Mrs. Rotton and Mr. Dwarris		2	0	0
"Stamp on conveyance	- - -	6	5	0
" „ duplicate	- - -	0	5	0
		£50 10 0"		

Mrs. Rotton and Dwaris were mortgagees who concurred in the conveyances.

George's solicitors on the 5th wrote to Lacey & Son objecting to a charge being made according to the percentage scale fixed by the new Rules :—"The purchase being carried out under an agreement made long before the Rules came into operation, and when no such charge for costs could have been contemplated by the purchaser, we do not think that the scale applies." They went on to propose that the purchase should be completed on payment of the amount claimed exclusive of the £50 10s., letting that stand over until the amount could be settled.

Lacey & Son declined to accede to this proposal or to part with the deeds except on payment of the whole sum; and on the 14th February George's solicitors wrote to Lacey & Son a letter inclosing cheques for the full amount, stating that the delay which would be entailed by taxation would be so prejudicial to the purchaser that he had directed them to pay the costs, but only under protest, and that unless a settlement could be come to they should apply to have them taxed. On the 21st the deeds, duly executed, were sent to the purchaser.

On the 4th of October, 1883, a summons was taken out on behalf of George to have the bill taxed, and was adjourned into Court and heard before Vice-Chancellor Bacon on the 17th of November, 1883.

T. Brett, for the purchaser :—

We ask to have the solicitor's bill taxed according to the agreement of December, 1881, under the scale in force before the General Order under the Solicitors' Remuneration Act, 1881, came into operation. At the time when the agreement of the 19th December, 1881, was entered into, the General Order under the Solicitors' Remuneration Act, 1881, had not been issued, and it is contemplated by the Act, secs. 2, 4, that the provisions of the Act are not applicable until the General Order shall have come into operation. Reliance will be placed on sec. 7, which provides that as long as any General Order under the Act is in operation taxation shall be regulated thereby; but sec. 8 enables a solicitor and client to agree on the form and amount of remuneration and

Appeal.
1883.

contract themselves out of the Act. In this case the parties must be presumed to have made their contract according to the law as it then existed (before the Act). But we rely mainly on the fact that everything was practically completed except the engrossing and execution of the conveyance before the 1st of January, 1883, from which date the General Order under the Act came into force. The purchaser has not lost his right to have the bill taxed, as the solicitors refused to allow the transaction to be completed until the bill was paid, and, therefore, payment was made under what has been held to amount to pressure such as to justify taxation after payment: *Morgan and Wurtzburg on Costs*, page 449; *In re Newman* (1); *Re Pugh* (2).

F. W. Bush, for Messrs. Lacey & Son, the solicitors:—

The business relating to the purchase was not transacted until after the 31st of December, 1882—the conveyance having been signed in February, 1883—and, therefore, by sec. 7 of the Solicitors' Remuneration Act, 1881, the taxation, if directed, must be regulated by the scale under the General Order which had then come into operation.

We submit, further, that this is not a case in which the Court will direct taxation on an application not made until eight months after payment of the bill. There was no pressure, as the purchaser had ample opportunity for examining the bill, which was delivered fourteen days before the date fixed for completion. He cited *In re Barrow* (3); *In re Neate* (4); *In re Welchman* (5); *Re Pugh* (6).

BACON, V.C. :—

There is clear evidence of pressure in this case, so that the purchaser is entitled to have the bill taxed. The real question to be decided, however, is as to the effect of the Solicitors' Remuneration Act, 1881. From sec. 4 it is clear that it did not come into operation, and that the old practice was to subsist until the General Order to be made under the powers given by the Act should have come into force.

(1) Law Rep. 2 Ch. 707.

(2) 32 Beav. 173; 1 D. J. & S. 673.

(3) 17 Beav. 547.

(4) 10 Beav. 181.

(5) 11 Beav. 319.

(6) 32 Beav. 173; 1 D. J. & S. 673.

In this case every one of the particulars mentioned in sec. 4 to be taken into consideration in determining the amount of remuneration had been disposed of before the new Act came into operation. The capital was known, all skilled labour had been performed, and all the documents had been prepared before the 31st December, 1882; but the conveyance had not then been executed. Sec. 7, which says that as long as any General Order under this Act is in operation the taxation of bills of costs of solicitors shall be regulated thereby, does not apply to transactions so far advanced as this was. In this case all the important matters had been performed before the Act came into operation, and nothing was done afterwards but the mere formal completion of the purchase.

Nothing whatever, therefore, having been done under the Act of 1881, taxation must take place under the old orders; and I direct the bill of Messrs. Lacey & Son to be taxed, regard being had to the scale in force prior to the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.

Summons allowed with costs.

Lacey & Son appealed. The appeal came on for hearing on the 12th of December, 1883.

Millar, Q.C., and Bush, for the appellants:—

First, we say that the bill cannot be taxed at all, as no application to tax was made until after payment. The petitioner had the bill in his hands from the 2nd to the 14th of February, and then paid it, so there was no pressure, and it is not alleged that there are overcharges amounting to frauds. Secondly, supposing the bill taxable, it ought to be taxed under the new rules made under the Solicitors' Remuneration Act, 1881, which were to take effect from the 31st December, 1882.

Brett, contra:—

The Vice-Chancellor thought that as the agreement had been entered into in 1881, and the negotiations had been completed in 1882, before the period covered by the new orders, the old scale of

Appeal.
1883.

charges ought to apply. But supposing the case comes under the new rules, the first rule of the General Order provides that the schedule shall not apply to land the title to which is registered, which shows that it was intended that the scale should apply only in cases where the ordinary course of a sale is carried out. Here nothing was done but perusing a couple of short drafts. The work for which the *ad valorem* charges are given in Schedule I., Part I., was not done. That schedule, therefore, is inapplicable, and the case comes, by virtue of Rule 2 (c), under the old scale as modified by Schedule II. I contend, however, that the Vice-Chancellor was right in holding the case not to be within the new rules at all. The Act is not retrospective, and cannot apply to a contract entered into before it: *Ward v. Eyre* (1). There was sufficient pressure to authorise taxation: *In re Newman* (2); *Re Pugh* (3).

Millar, in reply:—

Pressure is out of the question, for the purchaser was not bound to complete till the 25th of March, and he chose to complete in February for his own convenience; the pressure was on his side. There is no case where the refusal to hand over deeds until the solicitor's claim has been satisfied has been held to amount to pressure where the bill has been delivered so long before as here: *In re Welchman* (4). The remarks of the Master of the Rolls in *In re Harrison* (5) apply here; there is no ground for taxation but alleged overcharge.

[COTTON, L.J.—Is there not more than that—a charge for work which has never been done?]

The solicitors honestly made out their bill in this way, considering that under the Act they had no option. The charge seems high, but the object of the Act and Rules was to give an average. In some cases the percentage gives an unreasonably large amount of remuneration for the work done; in others it gives it as much too little.

(1) 15 Ch. D. 130.

(2) Law Rep. 2 Ch. 707.

(3) 32 Beav. 173; 1 D. J. & S. 673.

(4) 11 Beav. 319.

(5) 10 Beav. 57.

COTTON, L.J. :—

Appeal.
1883.

This is an appeal by Messrs. Lacey & Son from an order for taxation of their bill of costs, with a direction that the scale contained in the General Orders under the Solicitors' Remuneration Act, 1881, does not apply. The appeal is based on two grounds; first, that the Judge was wrong in saying that the new scale does not apply; and, secondly, that the bill could not be taxed at all, for that it had been paid, and there were no special circumstances to authorise a taxation. In the view we take of the case it is not necessary to decide whether the new scale applies; but, as the point has been fully argued, and is of general importance, we will give our opinion upon it. We are of opinion that if the business done had been business within the description of the business to which Schedule I. applies, it would properly be charged for according to that schedule. But what has been done here is to make the *ad valorem* charge of 30s. per cent., which the rules authorise a vendor's solicitor to make for "deducing the title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)." In the present case there was no deduction of title, for the purchaser, when he gave notice of his intention to purchase, stated that he did not want an abstract. All that Messrs. Lacey and Son did was to peruse the two deeds sent them by the purchaser's solicitor, each being about twenty-eight folios in length, to procure their execution, and to attend the completion. For this business £16 10s. was charged in respect of one lot and £17 10s. in respect of the other. These charges appear to be largely in excess of what could reasonably be charged. In my opinion the rules do not authorise the charging the percentage there mentioned, unless the work there mentioned as being the work for which it is chargeable has in substance been done. I consider, therefore, that the percentage here claimed was not chargeable, but that the case is governed by Rule 2 (c). "In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed . . . and in respect of all other deeds or documents, and of all other business the remuneration for which

Appeal.
1883.

is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." In my opinion, then, as the work of deducing title has not been done, the case is one not provided for by Schedule I., and falls within Schedule II.

The bill, then, as it appears to me, contains serious overcharges, but in my opinion we cannot, without over-ruling the whole current of decisions, direct a taxation. After payment special circumstances are requisite to authorise taxation, and these special circumstances must be pressure and manifest overcharges, or overcharges so gross as to amount to fraud. It cannot be said that these are overcharges amounting to fraud, and I think that pressure is not shown. The bill was delivered six weeks before the time fixed for completion, and though the time for completion was anticipated, that was at the desire of the purchaser, and the bill had been in his hands nearly a fortnight before the time of actual completion. Under these circumstances I cannot think that there was pressure. The cases nearest to the present are cases where the bill was not delivered till the time of completion; but that is a very different state of things. If when parties are met to complete the bill is for the first time produced, and the solicitor refuses to allow the matter to proceed unless it is paid, that is pressure; but the case is quite different when sufficient time has been allowed to consider the bill. I am of opinion that the order of the Vice-Chancellor must be discharged.

LINDLEY, L.J. :—

The first question is whether this bill can be taxed at all after payment; and, without attempting to define what are sufficient special circumstances to authorise a taxation, I agree that we cannot say that such circumstances exist here. The time fixed for completion was the 25th of March, but for the purchaser's convenience the purchase was completed on the 14th of February. The bill had been sent on the 2nd. These dates are sufficient to show that there was no pressure, and the bill, therefore, was not liable to taxation.

This is all that it is necessary to decide; but a question of general importance has been argued on which we think it right to give our opinion. The bill is framed on the supposition that the

new rules apply, and that supposition, I think, is right; but it is also framed on the supposition that Schedule I. applies, and that, in my opinion, is wrong. I think that the 30s. per cent. can only be charged in the case provided for: viz., where substantially the whole of the work mentioned—*i.e.*, deducing the title and perusing and completing the conveyance—is done. The rules cannot, in my opinion, be construed as authorising the solicitor to charge the percentage where he does nothing but peruse and complete the conveyance.

FRY, L.J.:—

I regret that I am compelled to concur in the conclusion that a taxation of this bill cannot be directed. The dates negative pressure, and, that being so, there are no special circumstances to justify an order for taxation. As to the other question, I concur in the opinions which have been already expressed. I think that the solicitors made out their bill on a wrong footing. They assumed, and I think correctly, that the new rules were applicable. But Schedule I. only applies where substantially all the things for which the percentage is chargeable are due. The clause of Schedule I. which bears on the present case mentions four things—deducing the title, perusing the conveyance, completing the conveyance, and preparing contract or conditions of sale. It is not necessary in order to enable the solicitor to make the charge that a contract or conditions should be prepared, the schedule saying that the work for which the charge is made includes the preparation of the contract or conditions, “if any;” but in my opinion the charge cannot be made unless the other three things are done. Here an important part of the business specified was not done. I think, therefore, that Schedule I. is not applicable, and that under Rule 2, sub-sec. (c), the remuneration of the solicitors was regulated according to the old system as modified by Schedule II. I am of opinion, therefore, that the bill was framed on an erroneous footing; but, as we have no jurisdiction in the absence of special circumstances to order taxation after payment, the order of the Vice-Chancellor must be discharged.

Solicitors for Lacey & Son: *Todd & Deimes*.

Solicitor for respondent: *J. B. Ottley*.

Kay, J.
1884.

Feb. 14.

STANFORD v. ROBERTS.

(1854, s. 55.)

(By permission, from 26 Ch. D. 155; s. c. 32 W. R. 404; 50 L. T. 147; 53 L. J. Ch. 338.)

Suit for Administration—Taxation of Costs—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order, August, 1882, r. 2—Costs for Conveyancing business in an Action.

Solicitors who transact conveyancing business in an action will, under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), and the General Order of August, 1882 (W. N., 1882, Pt. II., p. 358), be allowed taxed costs and charges for such business according to the scales set forth in the schedules to the General Order.

The proper construction of the language of sect. 2 of the Solicitors' Remuneration Act, 1881, is that it refers to conveyancing matters which take place in an action as well as to those out of Court, and that the exception is only from "other business" not being conveyancing business, and accordingly where the Taxing Master had disallowed certain charges made for conveyancing business in an action, and under the scales of charges contained in the schedules to the General Order of August, 1882, he was directed to review his taxation.

ADJOURNED SUMMONS.—The application was by the plaintiff, asking that it might be referred back to the Taxing Master, to whom the taxation of the costs in this suit stood referred to review his taxation under the order dated the 31st of May, 1883, in respect of certain items of charge in the bill of costs of the applicant. The order of the 31st of May, 1883, directed the taxation of the costs of the plaintiff, including charges and expenses properly incurred by her incident to or attendant upon the negotiation for and exercise of the power by the will of William Stanford, deceased, vested in her as tenant for life, of granting leases for the term of ninety-nine years, and in and about the exercise of the powers of the Stanford Estate Act, 1871. The circumstances which led to the making of the order may be gathered from the reports of *Stanford v. Roberts* (1) and *Stanford v. Roberts* (2).

In taxing the plaintiff's bill of costs the Taxing Master had disallowed certain charges for settling conveyances, perusing documents, and for journeys to Brighton, where the property,

(1) Law Rep. 6 Ch. 307.

(2) W. N. (1882) 146.

which was the subject-matter of the suit and of such conveyances and documents, was situate. The charges were the proper amounts payable under the scales of charges contained in the schedules to the General Order made in August, 1882, in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44). By sect. 2 of the Act it was enacted that the Lord Chancellor and the other persons named might from time to time make any such General Order as to them seemed fit "for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business." The General Order made in August, 1882, and which came into operation after the 31st of December, 1882, contained in Rule 2 the language of the above section, "in respect of business connected with sales," &c., and the remuneration applicable to conveyancing business only was regulated as set forth in the schedules to the order. Objections to the taxation of the items so disallowed were left by the plaintiff in the office of the Taxing Master, and he stated to the Court the reason for his decision thus:—"I consider that the intention of the order is that the words in the 2nd section of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, 'not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master,' should apply to matters of conveyancing so transacted. I have therefore allowed in the matters of conveyancing transacted in the above suit the charges for such business heretofore allowed. It may be remarked that by having the sanction of the Judge in Chambers to all these transactions the solicitor incurs no responsibility, and simply acts under direction. The increased charges are in these costs applied to instruments not materially (if at all) shorter than they used to be."

Hastings, Q.C., and J. Beaumont, for the plaintiff:—

The General Order of August, 1882, with the scale of charges in the schedule, applies to conveyancing business whether trans-

Kay, J.
1884.

acted in an action or not. Grammatically the words of exception in the 2nd section, "not being business in any action," &c, must be referred to the words "of other business" which immediately precede. If the section be ambiguous the grammatical construction ought to be adopted. The statute 44 & 45 Vict., c. 44, was passed because the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), which received the royal assent on the same day (August 22, 1881), curtailed the length of conveyances, although the trouble and care required in preparing them had not been diminished. It was thought right that the scale of remuneration of solicitors, which had previously been allowed according to the length of the documents, should be re-adjusted. There can be no reason why solicitors should be remunerated on a scale differing according to whether the conveyancing business be done in an action or not.

Cecil Russell, for the trustees:—

Further arguments are referred to in the judgment.

KAY, J.:—

I think I must accede to the applicant's view of the meaning of the statute, which is certainly not very easy to construe. [His Lordship having read section 2, continued.] Now, grammatically the words "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business," must refer to the last antecedent—that is, "other business." "Other business" is contrasted with "business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing;" therefore grammatically the exception is from other business, and not from these matters of "business connected with conveyancing."

But then there are certain rules in the General Order of August, 1882, which were made in pursuance of the section, and they apply entirely, so far as I can make out, to conveyancing business as distinguished from contentious business, and there is nothing in the scale of costs contained in the schedules to the General Order except certain business which is, strictly speaking, conveyancing business. I can find nothing at all in the scale of charges which comes under the description of "other than conveyancing business" con-

tained in the above section, unless it be the items in Schedule 2 under the two headings, "Attendances" and "Journeys from home;" and, judging from the context, I suppose that these were intended to be "Attendances" and "Journeys from home" in respect of conveyancing business, because the 2nd schedule begins with these words, "Instructions for drawing and perusing deeds, wills, and other documents." So that the difficulty in the case seems to me to be mainly occasioned by the mode in which the rules under this section have been made, which rules do not apply to any other business than that which is ordinarily known as conveyancing business. However, I do not know that I am at liberty to construe the statute by a reference to the rules, and it may be that it was not thought necessary to make any rules with respect to the other business at present. There is, however, this difficulty, that the rules in the commencement of them profess to be made in order to regulate the remuneration of solicitors not only in respect of conveyancing business, but also, following the very words of the statute, "in respect of other business not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master," so that the rules, which are professedly made for the purpose of conveyancing and other business—whatever these words "other business" may mean—have provided, in fact, a scale of remuneration only for conveyancing business.

The two constructions of the section of the statute which are contended for are these: One is, that it means conveyancing business of every kind, whether in an action or not, and business other than conveyancing, not being business in an action, &c., or contentious business, confining the exception to the "other business." The other is, that it means only such conveyancing business as is not business in an action, &c., or contentious business, extending the exception not only to the last antecedent, but to all the words which precede. I have said that grammatically the former seems to me to be the true construction. But decidedly, looking at the whole language of the section, it is ambiguous, and the rule which applies to a document of an ambiguous kind is that the Court is bound to look at the reason of the thing, and see which is the most reasonable construction.

Now, the Solicitors' Remuneration Act, 1881, was passed, and

Kay, J.
1884.

the royal assent was given to it on the very day, the 22nd of August, 1881, on which the royal assent was given to another Act of Parliament—the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), which curtailed very much indeed, as it was intended to do, the length of conveyancing instruments. Up to that time the remuneration of solicitors for conveyancing business was calculated at so much per folio, and of course when an Act was passed curtailing the length of conveyancing documents, if the remuneration had been thereafter calculated upon the old scale the remuneration of solicitors would have been decreased, while at the same time the attention and care requisite for the settling of such documents might be very much increased. Therefore the obvious intention of the Legislature in passing the statute was to provide a different scale for calculating the remuneration of solicitors, so that it might not be unduly decreased by the change that was to take place simultaneously in the length of conveyancing documents. At the time when the two statutes were passed a solicitor was entitled to obtain remuneration for all the proceedings in an action, and if the proceedings included the settling of a conveyance or a deed of settlement, or any other kind of deed, he got his remuneration in respect of the deed under the old scale. Now, any such deed as that has been cut down, and unless the new scale of charges is to be applied to it, he will receive less in respect of a conveyance settled in an action than he would have received before. He will get all the same costs in respect of the action that he would before, but he will get less remuneration in respect of any deed settled in the action. Is there any reason why that should be? Obviously the fact that he gets remuneration from the other costs of the action can be no reason, because he got that remuneration before. There can be no reason why he should get less in respect of a deed settled in the action under the new system than he would have got before, and therefore I do not see any reason for putting a construction upon the Act which would give a solicitor the costs of a conveyance or settlement, or other deed, settled in an action upon the old scale, which costs would be admittedly less than he would be entitled to receive if the deed had been not a deed settled in an action at all, but a deed settled without any litigation going on concerning the matter.

There is one reason given by the Taxing Master which deserves special notice. He says, "It may be remarked that by having the sanction of the Judge in chambers to all these transactions, the solicitor incurs no responsibility and simply acts under direction." I am not quite sure about that, because it is possible that a solicitor may be guilty of such negligence in conducting the matter of a deed or settlement settled in chambers as to make him liable in an action for negligence, notwithstanding that the deed professed to be settled by the Court. The Court acts always upon the instigation of the solicitors employed in the matter, and suppose that by reason of the exceeding negligence of the solicitor employed by the plaintiff in an action a deed of settlement should be settled and passed in a form which omitted some of the provisions which the conveyancing counsel had recommended should be inserted in it, is it to be said that the solicitor is relieved from responsibility? I do not think so. There are many cases in which a solicitor would not be relieved from responsibility, although the deed was formally settled in Court, if the deed happened to be in a wrong form owing to his negligence.

Therefore I do not entirely accept the view of the Taxing Master on that point. But besides that there is another answer, viz.—that the trouble of the solicitor and the time taken up, the instructions drawn by him, and all the other matters connected with the deed and the perusal of the deed on behalf of the client, have all been done by him just the same, or very nearly the same, as if the deed was settled out of Court. Why should he not be remunerated for that time and trouble on the same scale as he would be if the deed were settled out of Court? I confess I do not see. Therefore it seems to me that if there be any ambiguity in the construction of the statute—and I am far from saying it is as clear as it might be—I ought to adopt that which is the reasonable construction, looking at the subject matter to which it is to be applied; and as I see no sufficient reason why a solicitor should not be remunerated on the same scale whether the deed be settled in an action or not in action, I think that the proper construction to put upon the statute is that it refers to conveyancing matters which take place in an action as well as to those out of Court, and that the exception is only from "other business," that

Kay, J.
1884.

is, from other business not being conveyancing business, as to which it may be at some time, if it has not been already, the duty of the persons making the rules to provide a scale of charges.

The order, therefore, will be that the Court being of opinion that the costs in question ought to be taxed under the Solicitors' Remuneration Act, 1881, the matter be referred back to the Taxing Master for him to review his taxation.

Solicitors: *Day & Cather; Senior, Attree, & Johnson*, agents for *Hunt, Currey, & Nicholson, Lewes*.

C. P. D.
1884.

Feb. 21.

HEFFERNAN AND KEEFE v. VAUGHAN AND OTHERS.

(By permission, from 18 Ir. L. T. R. 38)

(Before MORRIS, C.J., HARRISON and MURPHY, JJ.)

Taxation of costs—Discretion of Taxing Master—O. X., r. 33 (April, 1878).

The Taxing Master, in allowing the expenses of witnesses on the taxation of costs, should be guided by the direction of proofs of counsel rather than by what took place at the trial.

APPLICATION under Order X., rule 33, of the Rules of April, 1878, to review the taxation of costs by Master Coffey, in an action of ejectment which was tried before Baron Dowse in November, 1883. Two witnesses had been subpœnaed on behalf of the defendant to prove the terms of an arrangement stated to have been made when the parties were before the Land Sub-Commission at Kanturk in April, 1883, to have a fair rent fixed. One of these (Mr. Beytagh) who had acted for the plaintiffs in the court below proved the alleged arrangement, which rendered it unnecessary to call the other witness (Mr. Keller). The Taxing Master, when the case came before him for taxation, refused to allow an item of £31 4s., the amount of Mr. Keller's expenses, on the ground that that gentleman had not been examined.

Peter O'Brien, Q.C. (with him *John Francis Moriarty*), on behalf of the defendant.—The Taxing Master should be directed

to allow the sum of £31 4s. as part of the defendants' costs. Mr. Keller had been duly subpoenaed to attend the trial, and had come to Dublin in June, and again in November, as the case was not tried on the former occasion. His attendance was ordered by counsel in the direction of proofs, as although there was another witness to the arrangement relied on by the defendant, yet, he being to a certain extent connected with the opposite party, it was not considered safe to rely on his version alone.

Com. Pleas.
1884.

Henry O'Hea, on behalf of the plaintiffs, argued that it was not for the Court to interfere in such a case with the Taxing Master's discretion.

MORRIS, C.J., in giving judgment, said that the Taxing Master should not have taken any notice of what had occurred in court at the trial. He should have limited his attention to the proofs directed by counsel, and should not have disallowed the costs of any witnesses so directed to be subpoenaed. It was often necessary to direct witnesses to be in attendance whom it afterwards was not necessary to examine, yet that was no reason why their expenses should not be allowed. The case should be referred back to the Master to have the item of £31 4s., the expenses of Mr. Keller's attendance, allowed to the defendant in his bill of costs.

HARRISON, J., concurred.

MURPHY, J., also concurred. In his experience he often found that counsel wished to have certain witnesses examined though their evidence really was not required, merely lest their expenses should not afterwards be allowed on taxation.

Solicitor for plaintiff: *H. H. Barry.*

Solicitors for defendant: *J. & M. Moriarty.*

Appeal.
1884.

April 21.
June 9.

MICHAEL RYAN v. ROBERT FRASER

(By Original Action);

ROBERT FRASER v. MICHAEL RYAN

(By Counterclaim).

(By permission, from 16 L. R. Ir. 253; reversing s. c. in Court below, 18 Ir. L. T. R. 21.)

(Before SIR E. SULLIVAN, C., MAY, C.J., and FITZGIBBON and
BARRY, L.JJ.)

*Practice—Claim—Counterclaim—Set-off—Cross liquidated Demands—Form of
Judgment—Costs, where balance under £20 is recovered.*

In an action brought for a liquidated demand of £25 for work and labour the defendant pleaded a cross-liquidated demand as a counterclaim and the jury found for the plaintiff on the statement of claim for £22 8s. 6d., and for the defendant on the counterclaim for £9 13s., and the Judge at the trial directed judgment to be entered for the plaintiff for £12 15s. 6d., with his costs.

The Taxing Master allowed the defendant full costs, and, on motion to review his taxation, the Exchequer Division declared the plaintiff entitled to his full costs, and directed judgment to be entered that the plaintiff do recover from the defendant £22 8s. 6d. in respect to the cause of action in the statement of claim, with costs; and that the defendant do recover from the plaintiff £9 13s., in respect of the cause of action in the counterclaim, with costs; that the said sums and costs so recovered should be set-off, and the party in whose favour there should be a balance should recover from the other such balance:—

Held, reversing the order of the Exchequer Division, that one judgment should be entered for the plaintiff for £12 15s. 6d., and that the plaintiff, having recovered less than £20, was entitled to no costs, the parties being resident in the same civil bill jurisdiction.

In such a case a true set-off is not deprived of its real character of a defence by being described and pleaded as a counterclaim.

APPEAL from an order of the Exchequer Division of the 7th February, 1884. See the curial part of the order, *infra*, pp. 255, 256.

Post, 253.

The action was brought by William Ryan against Robert Fraser for the sum of £25, for work and labour done and performed by the plaintiff for the defendant.

The statement of defence, after traversing the allegations in the claim, proceeded as follows:—The defendant (admitting, for

the purposes of this defence, but not further or otherwise, that work was done for the defendant, as in the first paragraph of the statement of claim is alleged) says that the said work was done under an agreement entered into between the plaintiff and the defendant, by which, in consideration that the plaintiff and his wife would work as farm-labourers for the defendant, the defendant agreed to pay the plaintiff for such work at the rate of six shillings per week, and to give to the plaintiff the use of a certain cottage, the property of the defendant, whilst the plaintiff continued in the employment of the defendant; and the work mentioned in the first paragraph of the statement of claim was done under the said agreement, and the defendant satisfied and discharged all claims of the plaintiff in respect to the said work before action by payment at the rate aforesaid, as and when the same became due, and by giving to the plaintiff the use of a certain cottage, the property of the defendant, whilst the plaintiff continued in the employment of the defendant.

And by way of counterclaim the defendant says:—

1. Between the years 1881 and the commencement of this action the defendant sold to the plaintiff, and the plaintiff bought from the defendant, goods—to wit, potatoes—to the value of £5 8s. 6d. The plaintiff has not paid the said sum, or any part thereof.

2. In the year 1881 the defendant let to the plaintiff, and the plaintiff took from the defendant, one quarter of an acre of land, and the plaintiff agreed to pay the defendant for the said land the sum of £2 10s.; and the said sum of £2 10s. has not been paid.

3. On the 30th day of December, 1882, the defendant let to the plaintiff, and the plaintiff took from the defendant, a certain potato garden, and the plaintiff agreed to pay the defendant the sum of £2 10s. for the same. The said sum of £2 10s. has not been paid.

4. In the month of February, 1883, the defendant let to the plaintiff, and the plaintiff took from the defendant, a certain other potato garden, and the plaintiff agreed to pay the defendant the sum of £1 5s. for the same. The said sum of £1 5s. has not been paid.

Appeal.
1884.

The defendant, by way of counterclaim, claims :—

1. The said sums of £5 8s. 6d., £2 10s., £2 10s., and £1 5s., making together the sum of £11 13s. 6d.

2. His costs of the action.

The plaintiff delivered a reply, and on these pleadings issue was joined.

The case was tried before Mr. Justice Andrews and a common jury in Dublin on the 12th December, 1883. The jury found in the original action for William Ryan, the plaintiff therein, for £22 8s. 6d., and on the counterclaim for Robert Fraser (the defendant in the original action and the plaintiff in the counterclaim) for £9 13s. The Judge directed that the judgment should be entered for Michael Ryan, the plaintiff in the original action, for £12 15s. 6d., together with the costs of suit.

The Taxing Master on taxation allowed the plaintiff full costs, on the ground that he had recovered judgment in the original action for over £20. The defendant thereupon moved the Exchequer Division to review the taxation of the costs, on the ground that the plaintiff was not entitled to any costs, inasmuch as he recovered judgment for a sum less than £20, and the parties, plaintiff and defendant, resided in the same civil bill jurisdiction.

The Exchequer Division (Palles, C.B. Dowse, B., and Andrews, J.) made no rule on the defendant's motion, and upon the application of plaintiff's counsel, who moved by permission of the Court, made the following order :—

“The Court doth declare the plaintiff to be entitled to his full costs of this action, and doth order that the judgment in this action be amended by changing same into a judgment to the following effect :—That the plaintiff do recover from the defendant the sum of £22 8s. 6d. in respect of the cause of action in the statement of claim, with costs ; and that the defendant do recover from the plaintiff the sum of £9 13s. in respect of the cause of action in his counterclaim, with costs ; that the said sums and costs so recovered shall be set-off against the other, and that the party in whose favour there shall be a balance shall recover from the other the amount of such balance. It is further ordered that the said costs be referred back to the said Taxing Officer, having

regard to the said amended judgment, and that both parties do abide their own costs of this motion" (1).

Appeal.
1884.

The defendant appealed.

J. H. M. Campbell, for the appellant:—

If the counterclaim in this case had been relied on, and pleaded as a set-off under the old system, the amount recovered would have been the balance, and the plaintiff would have been disentitled to costs: *Ashcroft v. Foulkes* (2). The rules under the Judicature Act were framed to give a more extended right of set-off by allowing a defendant to get judgment if the balance was in his favour, and by setting off claims which he could not have set-off under the old system. No distinction is drawn by the rules between the terms "set-off" and "counterclaim." Schedule rule 22 provides: "A defendant in an action may set-off or set up by way of counterclaim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not; and such set-off or counterclaim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action both in the original and the cross-claim."

If the amount found by the jury for the defendant on his counterclaim had been in excess of plaintiff's claim there should, under G. O. XXI., r. 10, have been judgment in his favour for the balance only. This is so, whether it be a set-off or a counterclaim; and this rule, when read with the schedule rule, shows that in such cases the amount recovered, and for which judgment is to be marked, is the balance merely, whether it be in favour of plaintiff or defendant. In the Forms, Appendix C., No. 8, the counterclaim is stated to be by way of set-off and counterclaim, and the omission of the words "set-off" in this case cannot alter its nature and effect. In *Stooke v. Taylor* (3) Cockburn, C.J., in his judgment, says, on the facts of that case, which resemble the present: "Claim and counterclaim being for liquidated damages to the extent to which the amount established by the defendant was co-extensive with, and so operated to extinguish the plaintiff's claim, the counterclaim operated as a set-off;

(1) See 18 Ir. L. T. R. 21.

(2) 18 C. B. 261.

(3) 5 Q. B. Div. 569.

Appeal.
1884.

in reference to the amount by which it exceeded the plaintiff's claim it operated as a cross-action, recovering in which the defendant would be entitled to his costs." Again, p. 581: "Where the only issue is whether or to what extent a plaintiff can make out his claim, or where the defence consists of mere set-off, though pleaded in the form of a counterclaim, the award of the arbitrator as to amount may well be held to be the event on which the costs are to depend."

In the present case the items in the counterclaim are all for liquidated damages and matters of mere set-off. *Lowe v. Holme* (1) is a direct authority for the proposition that the Court must give effect to the defendant's counterclaim when it operates as a defence to the action by deducting it from the amount of the plaintiff's claim, even though it is pleaded as a counterclaim, and not as a defence.

[Counsel also referred to *Chatfield v. Sedgwick* (2); *Neale v. Clarke* (3); *Gathercole v. Smith* (4).]

A. Cleary, Q.C., for the respondent:—

The counterclaim here was throughout the case treated as a cross-action and not as a set-off, and the plaintiff having in the original action recovered over £20 he is entitled to his full costs. In *Baines v. Bromley* (5) Lord Justice Brett says, that if in that case the defendant chose to deny the whole of the plaintiff's claim and to rest on his cross-action, the form of the judgment would be right. That is what the defendant has done in this case, he having by his pleading treated his claim as a cross-action and not a set-off. There having been two independent actions in this case the judgment must be entered separately for each party: *Ward v. Morse* (6); *Hannan v. Laffan* (7). It is a distinct benefit to a defendant to plead a cross-claim as a counterclaim and not as a set-off, as if he pleads it by way of set-off the plaintiff can, by discontinuing the action, prevent the defendant going on with the cross-claim; but if the defendant has pleaded it by counterclaim,

(1) 10 Q. B. Div. 286.

(2) 4 C. P. Div. 459.

(3) 4 Ex. Div. 285.

(4) 7 Q. B. Div. 626.

(5) 6 Q. B. Div. 691.

(6) 23 Ch. Div. 377.

(7) 15 Ir. L. T. R. 32.

discontinuing the action will not put an end to the counterclaim: *M^cGowan v. Middleton* (1), where *Vavas seur v. Krupp* (2) was over-ruled.

Appeal.
1884.

Campbell, in reply:—

As to the argument, that where a set-off is pleaded as a counterclaim the plaintiff cannot discontinue, but must go on to prevent a judgment against him on the counterclaim, the answer is, that the plaintiff can, as a defence to the counterclaim, set-off the very items in his original action. In *Baines v. Bromley* (3) no question was raised as to the form of the judgment, and the only question was, how were the costs to be taxed on the form of the judgment as entered up; and the judgment of Brett, L.J., is distinctly based on the fact that the counterclaim was in its nature a cross-action and not a set-off. In *Hannan v. Laffan* (4) the claim being *in tort* *Ante*, p. 218. for unliquidated damages, and the counterclaim on a promissory note for a liquidated sum, it was impossible to set-off the amounts.

SIR EDWARD SULLIVAN, C.:—

This case of *Ryan v. Fraser* is an appeal from a judgment of the Exchequer Division, and has been argued with great learning on both sides; and I am sorry that the substance of the appeal is not larger than it is, for we are hearing a case where the sum of £12 5s. 6d. was recovered by the plaintiff after considerable litigation, and the appeal now is as to the mode in which the judgment is to be entered.

June 9.

The action was tried before Mr. Justice Andrews. The statement of claim averred that the defendant was indebted to the plaintiff in the sum of £25, money payable by the defendant to the plaintiff for work done for the defendant at his request, and was indebted to him in the same sum of £25 for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. The defence on which this question principally turns denies that any work was done in the usual form, and also denies that any account was ever stated between the defendant and the plaintiff;

(1) 11 Q. B. Div. 464.

(2) 15 Ch. Div. 474.

(3) 6 Q. B. Div. 691.

(4) 15 Ir. L. T. R. 32.

Appeal.
1884.

and also pleads another defence, on which nothing turns, and then the pleading continues—"And by way of counterclaim, the defendant says, between the year 1881 and the commencement of this action the defendant sold to the plaintiff, and the plaintiff bought from the defendant, goods—to wit, potatoes—to the value of £5 8s. 6d. The plaintiff has not paid the said sum or any part thereof," and then alleges a number of lettings by the defendant of small pieces of land to the plaintiff, setting out a number of items, and claiming altogether £11 13s. 6d., to which defence there is the reply in due form, and to which reply there is a rejoinder. One wonders why litigation as to such small sums should be brought before the Superior Courts.

The case was tried before Mr. Justice Andrews, and the counterclaim resolved itself into a simple set-off, and it was treated at the trial as a set-off, and the jury found for the plaintiff in the original action for the sum of £22 8s. 6d., and for the defendant in respect of the counterclaim for £9 13s., and the Judge directed that judgment should be entered for the plaintiff for £12 15s. 6d. There was a struggle before the Taxing Master as to how the costs should be taxed. Mr. Justice Andrews thought that the parties were entitled only to deal with the case as if £12 15s. 6d. were recovered in the action. There was a motion before the full Court of Exchequer, and we have the misfortune to differ from the Exchequer Division. The Exchequer Division treat the case as a separate judgment for the plaintiff for £22 8s. 6d., and another for the defendant for £9 13s., and their order is in these terms:—

Ante, p. 258. [The LORD CHANCELLOR read the order, as stated *ante*, p. 255.]

Now the effect of this order, if it stands, is this, that in a case that has the result I have mentioned, where neither plaintiff nor defendant ought to get a shilling of costs against one another, both get costs. We think the substance has been abandoned by adhering too closely to the letter of the law. The Judge thought it was a set-off, and tried it as such; and we have no doubt that if he had been asked at the trial for leave to amend the counterclaim by making it a set-off he would have done so as a matter of course.

We think it would be a wrong result that a man who recovered

£12 15s. 6d. in an action should get costs. We think, therefore, that the order must be varied by restoring the judgment to the original form in which it was entered by Mr. Justice Andrews.

Appeal.
1884.

MAY, C.J. :—

Since the passing of the Judicature Act, under the provisions of which defendants were enabled to assert counterclaims for unliquidated demands against plaintiffs as distinguished from claims of liquidated demands by way of set-off, many questions have arisen with respect to the form of judgment and the right to costs of plaintiffs and defendants where their respective claims have been adjudicated upon in one and the same action. I will refer to a few of the numerous cases which have arisen.

In the case of *Hannan v. Laffan* (1) an action was brought by *Ante*, p. 218. the plaintiff against the defendant for assault; there was a counterclaim by defendant on foot of promissory notes. A verdict for the plaintiff for £100 in respect of the assault, and for the defendant £100 in respect of the counterclaim. The Court directed that the plaintiff should recover £100 on his claim, with costs, and the defendant £100 on his counterclaim, with costs; and that these sums be set-off, and the party to whom a balance should be awarded should recover that balance. In this case the plea of the defendant was not by way of set-off or defence to the action, but raised a separate and distinct claim under the Judicature Act, and the order of the Court was, no doubt, within the provisions of the Act.

In the case of *Lowe v. Holme* (2) the plaintiff claimed a considerable sum as on foot of the contract price for work done. The defendant, by way of counterclaim and set-off, pleaded that, having regard to the inferiority and defects of the work done and the amount paid by the defendant, there remained a balance due from the plaintiff to the defendant; and, upon a reference, the referee found that in fact a small sum was due to the defendant. There the Court considered that the plea of the defendant was not properly one of counterclaim, but afforded an answer to the original claim, and they gave judgment for the defendant for the balance found due to him, with the costs of the suit.

(1) 15 Ir. L. T. R. 32.

(2) 10 Q. B. Div. 286.

Appeal.
1884.

In the case of *Baines v. Bromley* (1) the plaintiff claimed commission due to him by the defendant. The defendant claimed by way of counterclaim a sum due to him for goods sold. The jury found a verdict for the plaintiff for £114 17s. 6d., but for the defendant the sum of £230. The judgment entered was that the plaintiff recover £ for his costs of suit, and that the defendant recover £115 2s. 6d., being the balance on the counterclaim, and £ for their costs of the counterclaim. Upon this form of the judgment the Court of Appeal held that the plaintiff was entitled to the costs of the cause. That case turned upon the form of the judgment, which was entered as if the plea of the defendant was a counterclaim, it being apparently admitted that if the judgment had treated the plea as one of set-off the defendant should have been allowed the costs of the cause.

Previous to the Judicature Act, if the defendant pleaded a defence by way of set-off, and established a demand exceeding the claim of the plaintiff, the defendant would have succeeded in his defence, and obtained judgment, with costs, against the plaintiff. In the present case it would appear that it fell within the procedure before the Judicature Act. The claim of the plaintiff and defendant were both for liquidated demands, and the plea of the defendant was not a counterclaim, but simply a defence by way of set-off, by which it was competent to the defendant either to reduce the demand of the plaintiff or to extinguish it altogether, as the case might be. I do not think that the nomenclature of the defendant altered the substantial nature of the case, nor do I see any reason why, in such a case, the Court should follow the example of *Baines v. Bromley* (1), going out of its way to pronounce separate judgments in respect of claims quite of a cognate character. I should prefer the course taken in the case of *Lowe v. Holme* (2). In the case before the Court in reality the defendant reduced the demand of the plaintiff, and the judgment should have been entered accordingly, and the plaintiff be allowed the costs attributable to this reduced demand, and I think the judgment of the Court should be varied accordingly.

(1) 6 Q. B. Div. 691.

(2) 10 Q. B. Div. 286.

FITZGIBBON, L.J. :—

Here, in fact and in law, there was a liquidated demand and a liquidated cross-demand, leaving a small liquidated balance, and nothing else, to be recovered in the action. In my opinion neither ingenuity nor inadvertence on the part of the pleaders should be allowed to succeed in making two causes of action out of that state of facts, or to found a liability to two sets of costs in the High Court in a case in which recourse ought not to have been had to that Court by either party.

BARRY, L.J., concurred.

The following is the order that was made :—

“ It is ordered that the said order of the Exchequer Division, dated the 7th day of February last, be, and the same is hereby, reversed; and the Court doth order that the amendments directed to be made in the judgment of this action, in pursuance of the said order of the 7th day of February last, be, if necessary, expunged, and that the said judgment be restored to its original form, as directed to be entered by the Judge at the trial—viz., for Michael Ryan, the plaintiff in the original action, for £12 15s. 6d., together with his costs of suit, if he may be entitled to such, and let the Taxing Master, if necessary, tax the same accordingly; and it is further ordered that the plaintiff, Michael Ryan, do pay to the defendant, Robert Fraser, the costs incurred on the motion and order of the 7th day of February last, together with the costs of this appeal, when taxed by the Taxing Master.”

Solicitor for defendant, appellant: *Standish O'Grady.*

Solicitors for plaintiff, respondent: *O'Riordan & Mandeville.*

Chan. Div.
1884.

In re SECRETARY OF STATE FOR WAR and DENNE.

Nov. 10.

(By permission, from 33 W. R. 120; s. c. 51 L. T. 657; 54 L. J. Ch. 45.)

(Before PEARSON, J.)

Vendor and Purchaser—Costs—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order, 1882—Pending Business.

The purchaser, under an agreement dated in June, 1882, agreed to pay the vendor's costs of making out and verifying his title. The vendor, until some time in December, 1882, employed a country solicitor, but in April, 1883, instructed a London firm of solicitors to act for him:—

Held, that the London solicitors were only entitled to costs under Schedule I. of the General Order to the Solicitors' Remuneration Act, 1881, which came into operation on the 31st of December, 1882, notwithstanding that the agreement was of a prior date.

Ante, p. 238.

In re Lacey, 32 W. R. 233, 25 Ch. D. 301, followed.

ADJOURNED SUMMONS.—By an agreement, dated the 16th of June, 1882, Mr. Denne contracted to sell a piece of land to the Secretary of State for War for public purposes for £325. The first term of the contract was this—"The vendor will at any time, at the request and cost of the solicitor (to the Treasury), produce to him all the documents in his possession, and will at any time, if and when required by the solicitor, but not otherwise, deliver up to him such abstract as he may require." By the 5th clause it was further agreed "that the purchaser shall pay to the vendor all reasonable and proper costs of making out and verifying his title to the hereditaments, and execute to the purchaser all such assurances thereof as he shall require." At first the communications with respect to this contract took place between the Treasury's solicitor and Mr. Stringer, Mr. Denne's country solicitor, but sometime about April, 1883, Mr. Denne instructed Messrs. Frere, Foster, & Co., solicitors in London, to act for him, and from that time until the completion of the purchase they did so.

On the 31st of December, 1882, before the transfer to the London solicitors, the General Order under the Solicitors' Remuneration Act, 1881, came into operation, and by rule 2 the

scale of costs set out in Schedule I. thereto was prescribed as the remuneration of the vendor's solicitor on a sale. *Chan. Div.*
1884.

The question arose on taxation of the costs whether this schedule applied at all to the case, as the agreement had been entered into previously to the passing of the rules. The Secretary of State for War took out a summons to determine the question whether, under the circumstances, the schedule should be held to apply or not. The London solicitor had not, under rule 6 of the General Order, made any election. The costs of the country solicitor, whose employment ceased before the end of 1882, were admittedly payable, and had been paid according to the practice before the Order of 1882 came into operation.

Stirling, for the Secretary of State for War, referred to *Re Ante*, p. 238. *Lacey* (1).

Buckley, for the solicitor:—

It is Mr. Denne's costs that have to be paid, and you cannot separate them into two parts. The business was a continuous one, and, even had they so wished, Messrs. Frere & Co. could not have elected under rule 6. The schedule cannot be held to apply; the solicitor has been deprived of the advantage of electing, and yet has had to supply the abstract as in the contract stipulated. This point was not argued in *Re Lacey*, and appears to have been lost *Ante*, p. 238. sight of entirely. Moreover, the *dictum* relied on was only an expression of opinion, and quite unnecessary for the judgment.

Stirling, in reply:—

The Treasury can only be called upon to pay such costs as Mr. Denne would have to pay the solicitors. The employment of Messrs. Frere began in April, 1883; they could have elected.

PEARSON, J. (after stating the contract and the facts of the case, continued):—

To my mind the argument is irresistible, and I cannot give to Mr. Denne any greater costs than his solicitor is entitled to charge against him. The whole meaning of the contract was that Mr. Denne personally was to be held free from those costs. To my

Chan. Div.
1884.

mind, under that contract, whatever costs for furnishing the abstract, which was required, the solicitor is entitled to be paid by Mr. Denne, those costs the Secretary of State must pay to Mr. Denne, so that he may discharge his solicitor. As far as I can see, inasmuch as the business was commenced by the London solicitor after the Order of 1882 came into operation, the result is this, that the solicitor, with his eyes open, knowing that those were the costs which he would be entitled to charge, abstained from making any special agreement of any sort or kind, and was content to take the business upon the terms of being paid the costs as then settled and established by this Order; and if the Secretary of State were out of the way altogether, and if the matter were simply an ordinary transaction between Mr. Denne and somebody else, and Mr. Denne had to pay these costs out of his own pocket, I cannot see how the solicitor, under these circumstances, could require from Mr. Denne any greater costs than those which are described by Schedule I. of this Order. I am also referred to the authority of *In re Lacey*, which has been much commented upon. Now, in that case the agreement that the vendor would sell to the purchaser was contained in an agreement dated the 19th of December, 1881; by that agreement an option was given to the tenant to purchase if he pleased, and if he did purchase he was to pay the vendor's costs. Notice was given in 1882. The bill came to be taxed in 1883, after the Order was in operation, and although, as Mr. Buckley says, it was not necessary in that case to decide the question whether or not the proper costs came under Schedule I., yet the Court, consisting of three Judges of the Court of Appeal, decided that Schedule I. did apply. I do not think, having that confident expression of opinion of all the three Judges that that was the proper construction of the Order of 1883, that I am at liberty to depart from it, whatever my own opinion might be, if the case were *res integra* before me. I think it would be disrespectful to the Court, and, as far as I can see, it would be useless to the suitor, because, on an appeal, I cannot help supposing the Court of Appeal would adhere to the opinion which the Court of Appeal has already given.

Ante, p. 233.

Then it is said that in the argument in that case there was a very serious point omitted, that the solicitor had no opportunity

of contracting himself out of the Order. In the first place I should be very slow to impute to the Judges in the Court of Appeal an oversight in not having seen that point, if the point was one that really and truly could be bravely argued, but, as it seems to me, it does not arise here, because, inasmuch as the employment of the London solicitor did not take place until four months after the Order was in force, in the present case the solicitor had the opportunity of contracting himself out of the Order if he pleased, and he did not avail himself of that opportunity. On these grounds, therefore, I come to the conclusion that, on the present occasion, the only costs to which the solicitor is entitled must be costs taxed and assessed on the figures mentioned by Schedule I.

I told Mr. Buckley, in the course of his argument, that, very possibly, if I had to decide this case according to my feelings I should be very much disposed to decide in his favour. The abstract that was delivered was delivered in accordance with the request of the solicitor for the War Department; it is twenty-seven brief sheets; and if I were to speculate upon the matter, and ask myself whether I thought 30s. was a sufficient allowance for that, I think I should probably come to the conclusion, speaking hastily probably, that 30s. was a very small remuneration. But I cannot help seeing this, that one gentleman who signed the Order in question was the then President of the Incorporated Law Society; and I must come to the conclusion that he, who must know all these matters infinitely better than any Judge can know them, agreed with the learned Judges who sanctioned that Order that the 30s. was a sufficient remuneration, and I do not mean, in any way whatever, to take upon myself the presumption of over-ruling his opinion.

Solicitors: *Hare & Co.* for the Solicitor to the Treasury; *Frere, Foster, & Cholmeley.*

Chan. Div.
1885.

In re HICKLEY and STEWARD.

(By permission, from 38 W. R. 320; s. c. 52 L. T. 89; 54 L. J. Ch. 608.)

Jan. 20, 22, 23

(Before CHITTY, J.)

Solicitor—Bill of Costs—General Order made in pursuance of the Solicitors' Remuneration Act (44 & 45 Vict. c. 44).

W. instructed H. and S. to prepare an agreement for a lease, and it was, on the 8th of August, 1881, duly prepared and its execution procured by them. The agreement contained a clause that the lease should be according to the terms set out in the schedule to the agreement. In 1883 W. instructed H. and S. to prepare the lease, and it was prepared according to the terms in the schedule to the agreement and afterwards executed. H. and S. then sent in to W. their bill of costs, which contained an item of between £17 and £18 for the cost of preparing the agreement in 1881, and lower down in the bill was an item, dated June, 1883, in these words :—“*Re lease, &c.* . . . To costs of preparing, engrossing, executing, and completing lease and counterpart, as per Schedule I. of the Solicitors' Remuneration Act, £59 10s.” Then followed an item of £23 15s. for stamps, and £6 12s. 9d. for the costs of mortgagees who concurred in the lease. The Taxing Master, thinking that part of the work charged for in the £59 10s. had already been charged for in the item for preparing the agreement, taxed £20 off the £59 10s., and directed a detailed bill of costs for the preparation of the lease to be brought in, but did not tax the detailed bill, which amounted to £56 14s., including the above-mentioned items of £23 15s. and £6 12s. 6d. On a summons being taken out to review the taxation :—

Held, that the Master was wrong in taxing off £20, and allowing the scale charges of Schedule I., Part II., of the Solicitors' Remuneration Act, 1881, and that the matter must go back to him with a direction to tax the detailed bill.

ADJOURNED SUMMONS.—This was an application to review the taxation of a bill of costs. The question was, whether, under the circumstances of the case, the Taxing Master was right in allowing the scale charges contained in the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, and which order came into force from and after the 31st of December, 1882.

In the year 1881 Robert James Worley instructed Messrs. Hickley & Steward to prepare an agreement for a lease of certain property known as St. George's Warehouses. The agreement was prepared and a schedule was annexed to it containing all the terms of the lease. In the year 1883 fresh instructions were given by

Mr. Worley to Messrs. Hickley & Steward to prepare the lease and get it executed. The lease was duly prepared and executed, and contained all the terms set out in the schedule to the agreement, but certain persons, the mortgagees of the property, were added as parties.

Messrs. Hickley & Steward sent their bill of costs to Mr. Worley, and on the 4th of December, 1883, he obtained an order referring the bill to the Taxing Master. The items in the bill of costs were grouped under different headings according to the particular matters in respect of which charges were made. One of these headings was, "Agreement for lease of St. George's Warehouse," and the items thereunder were for work done in 1881, and amounted to £17 14s. 6d. Another heading was, "*Re* lease of 1 to 7, St. George's Warehouses, to Messrs. Gooch and Cousins," and the items thereunder were as follows:—

" 1883, June.—To costs of preparing, engrossing,					£	s.	d.
executing and completing lease and counter-							
part, as <i>per</i> Schedule 1 of Solicitors' Remune-							
ration Act					...	...	...
					...	59	10 0
" Stamps					...	...	...
					...	23	15 0
" Paid Messrs. Bircham's mortgagees' solicitors'							
charges					...	...	...
					...	6	12 9

The Taxing Master considered that part of the work charged for in the item of £59 10s. had already been charged for under the heading of "Agreement for lease of St. George's Warehouses;" and, accordingly, he taxed off £20 from the £59 10s., and directed a detailed bill, relating to the preparation of the lease, to be brought in, but did not tax that detailed bill. The detailed bill amounted to £56 14s., and included the above-mentioned items of £23 15s. and £6 12s. 9d. Mr. Worley carried in the following objection to the taxation of the item of £59 10s.—viz., that the Solicitors' Remuneration Act, 1881, did not apply, because the substantial work in the preparation of the lease to which the item related was done previously to the 1st of January, 1883, and was charged for in the agreement to which the draft of the lease as agreed was annexed, and that the work requiring to be done on the granting of the lease was only the engrossment and obtaining execution and exchanging.

Chan. Div.
1885.

The Taxing Master disallowed this objection, and gave the following reason:—"I allowed the scale charge on the authority of *Re Lacey* (1), decided by the Court of Appeal."

Ante, p. 238.

Mr. Worley then took out this summons to review the taxation.

W. R. Bousfield, in support of the summons:—

The preparation of the agreement and the preparation of the lease were distinct transactions, and not separate parts of one transaction. Schedule I., Part II., of the General Order only applies where the whole of the business there mentioned has been done: *Re Lacey*. Therefore, the scale mentioned in Schedule I., Part II., of the General Order, does not apply to the present case. The old scale of charges, as altered by Schedule II. of the General Order, ought to be applied.

Ante, p. 238.

Northmore Lawrence, contra.

CHITTY, J., after stating the above-mentioned facts, continued:

I think the Taxing Master was right in directing the detailed bill to be brought in and to that extent only.

The scale charges apply only where the solicitor has substantially done the work mentioned in Schedule I., Part II., of the General Order. This is shown to my mind by the General Order, and it is settled by *Re Lacey*. The Taxing Master has rightly thought that the solicitors had not altogether done the work mentioned in the schedule, because the terms of the lease were already set out in the schedule to the agreement. The Taxing Master has made a slight mistake. He has made a deduction instead of taxing the detailed bill for the actual preparing, engrossing, and executing of the lease, and he ought not to have allowed the scale charges even to the extent he did. If the scale charge in Schedule I., Part II., was not used, then the Taxing Master ought to have taxed the bills in accordance with Rule 2, Sub-section C., and Schedule II.

Ante, p. 238.

The result is that the matter must go back to the Taxing Master, with a direction to tax the detailed bill.

Solicitors: *Hughes, Hooker, Buttenshaw & Thunder; Clowes, Hickley & Steward.*

In re R. A. PARKER AND OTHERS.

Chitty, J.
1885.

(*By permission*, from 29 Ch. D. 199 ; s. c. 33 W. R. 541, 52 L. T. 636.)

Mar. 9, 10, 24.

Taxation—Solicitors' Charges—Perusing Abstracts—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order (containing Scales of Charges) of August, 1882, Schedule II.

Upon the construction of Schedule II. of the General Order (containing Scales of Charges) made in pursuance of the Solicitors' Remuneration Act, 1881, abstracts of title are not included in the words, "Deeds, wills, and other documents," the charge for perusing which is therein fixed at 1s. per folio ; but the old scale of 6s. 8d. for perusal of every three brief sheets of eight folios each remains unaltered.

ADJOURNED SUMMONS for review of taxation. .

Messrs. Sharpe, Parkers, & Co. were employed by Captain Atherley and others as their solicitors in reference to an exchange of freehold hereditaments and the surrender of leasehold hereditaments at Camberwell under agreements made in June, 1883, with the School Board for London.

On the 20th of November, 1883, Messrs. Sharpe, Parkers, & Co. delivered their bill of costs.

The bill was referred to taxation by order of the 6th of December, 1883, and the Taxing Master having disallowed the sum of £5 16s. 4d. in respect of a charge of £8 3s. for perusal of abstract, the question raised by this summons was, whether the charge for perusing an abstract should be 1s. per folio, or 6s. 8d. for three brief sheets (the old charge in force before the General Order of August, 1882, in pursuance of the Solicitors' Remuneration Act, 1881, 44 & 45 Vict., c. 44). The material part of this order was as follows :—

" SCHEDULE II.

" Instructions for and Drawing and Perusing Deeds, Wills, and other Documents.

" Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and

Chitty, J.
1885.

reasonable. In ordinary cases, as to drawing, &c., the allowance shall be—

For drawing ...	...	...	2s. per folio
For engrossing	8d. „
For fair copying	4d. „
For perusing	1s. „

Attendances.

In ordinary cases	10s.
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“In extraordinary cases the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit.

“Abstracts of title (where not covered by the above scales)—

Drawing each brief sheet of eight folios ...	...	6s. 8d.
Fair copy ...	...	3s. 4d.

Journeys from Home.

“In extraordinary cases the Taxing Master may increase or diminish the above allowance, if for any special reasons he shall think fit.”

By their objections to such disallowance the solicitors submitted that an abstract was a document within the meaning of Schedule II., and that the perusal of an abstract, being one of the most onerous and responsible of a solicitor's duties, was a duty for which he should be remunerated at the same rate at least as for the perusal of an ordinary deed. The mention of the charge for drawing and copying abstracts in Schedule II., which was at the old rate, showed that the meaning of the order was that perusing an abstract should not be left to be governed by the rates prevailing before the order, but by the rates thereby provided for perusal of “deeds, wills, and other documents.”

By his certificate the Taxing Master stated as follows:—

“The point is, whether, having regard to the context and the subsequent mention made of drawing and copying abstracts, abstracts are to be considered, as for the purpose of perusal only, as coming within the terms of ‘other documents,’ or whether these words could apply only to other documents of the same nature as

deeds and wills, or at least only to other documents in respect of which the fee for drawing is 2s. per folio, which would appear to be the natural construction of the rule. The allowance for drawing deeds, wills, &c., is an increased fee of 2s., instead of 1s., and the allowance for perusal is raised from 5s. for every fifteen folios to 1s. per folio, the allowance for copying and engrossing remaining the same as before. The allowances for ordinary attendances and journeys are also increased, whilst that for drawing and copying abstracts remains as it was in practice before. So that Schedule II., though in certain cases it gives no more than the old allowances, and leaves some matters, such as letters and attendances, other than ordinary ones, unnoticed, yet is generally in favour of the solicitor.

“It seems, however, to be hardly logical in the case of abstracts only to allow a larger fee for perusing than for drawing—viz., 8s. for perusing against 6s. 8d. for drawing; and on the reason of the thing larger charges are allowed for drawing and perusing deeds, wills, &c., because they are shorter, owing to numbers of clauses, provisoes, and covenants in common form being omitted. This would not apply to abstracts where these clauses and provisoes were always referred to in short. So it seems to me that, whether having regard to the words of the schedule or to the sense of the matter, the remuneration as to the perusal of abstracts is not altered by Schedule II., but remains as before, 6s. 8d. for every three sheets of eight folios.”

The solicitors had taken out a summons in Chambers that their objections to the taxation might be allowed, and that it be referred back to the Taxing Master to vary his certificate accordingly.

Macnaghten, Q.C., and *W. P. Beale*, in support of the summons.

No counsel appeared on the other side.

CHITTY, J.:—

The question on this summons is as to the meaning of the term “other documents” used in Schedule II. of the General Order made in pursuance of the Solicitors’ Remuneration Act, 1881. It has been contended on behalf of the solicitors that these words include abstracts, and consequently that the solicitors are now

Chitty, J.
1885.

entitled to 1s. per folio for perusing abstracts, instead of the old charge of 6s. 8d. for three brief sheets of eight folios each. The schedule is referred to in Rule 2 (c) in this way:—"And in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." On the face of it, Schedule II. does not contain an exhaustive statement of the system as altered by the rule itself, but merely contains certain alterations which are made in terms. It is noticeable that in Rule 2 (c) many documents are mentioned—settlements, mining leases or licenses, or agreements therefor, reconveyances, transfers of mortgage, or further charges, assignments of leases not by way of purchase or mortgage.

Now, turning to the schedule itself, the heading of that, which is not in form but in substance the first part of Schedule II., speaks of "Instructions for and drawing and perusing deeds, wills, and other documents." I should say, speaking roughly, the term "other documents" is sufficient to include abstracts. But then there is this consideration, which was probably in the mind of those who framed the rules, that an abstract is rather an epitome of a document than a document itself, and I think, from reading the other parts of the rules, that this becomes apparent. But the schedule is plainly, as I have intimated, divided into two parts. That is shown by the fact that the note which I am about to read occurs before the part which deals with abstracts of title:—"In extraordinary cases the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit." And then comes a new heading, "Abstracts of Title (where not covered by the above scales)," and those words, "where not covered by the above scales," refer undoubtedly to the scale scheduled. Then at the end of that, which I say is necessarily a second part of this Schedule II., I find a note similar to the note which I have just read. It appears to me, on the true construction of Schedule II., that "Abstracts" is a title used independently of, and intended to be in contrast with, "other documents." The result is, that abstracts of title are dealt with specifically, and that the old practice remains, except so far as an alteration has been expressly

Chitty, J.
1885.

affected; and I think, to answer the question with which I started, and the term "other documents" on the true construction of this schedule does not include abstract of title. It was well said that one of the objects of the new rules was to do away with the old system of remunerating solicitors simply according to the length of the documents that they drew or perused, and that as deeds under the new Conveyancing Statutes would be shorter than formerly, abstracts would be shorter also, and it would follow the solicitor had to employ greater mental labour in reading not merely the deeds, but in reading the abstract. There is some force undoubtedly in that observation, but in practice, though solicitors could read the abstracts, and do sometimes advise their clients themselves personally on the matter, it is generally found (I do not say it is the universal rule) that solicitors employ counsel, and do not undertake the responsibility of advising on a title except of the simplest kind. There is therefore some reason for saying that the framers of the rules did not intend to increase the remuneration of the solicitor for work which is rather of a mechanical kind, for merely reading through the abstract before sending it to counsel, from 6s. 8d., as it stood at the time when these rules were made, to 24s., as it would be if the contention of the solicitors in this case is held to be correct. One further observation on the rules, which is this, that I find some of the charges remain as they were at the time when the rules were passed, though the amount of remuneration is stated against the particular head. How that occurred I cannot exactly explain. Possibly there was some discussion about these particular heads, and in the result the old charges were continued. As the matter appeared to be one of some importance to solicitors, I requested the Taxing Masters to make a report to me on the subject, and I find that seven of them, as against one the other way, have in the taxation of bills acted upon the opinion which I have myself arrived at. I have arrived at my opinion independently of their report, but at the same time their report has given me valuable assistance in the matter. I therefore hold in this case that the Taxing Master is right.

Solicitors: *Sharpe, Parkers, Pritchard, & Sharpe.*

C. A.
1885.

In re FIELD.

March 24, 25.

(By permission, from 29 Ch. D. 608; s. c. 33 W. R. 553, 52 L. T. 480, 54 L. J. Ch. 661.)

(Before CHITTY, J.)

C. A., April 29.—*Solicitor—Pending Business—Negotiations for Lease—Remuneration Solicitors' Act, 1881 (44 & 45 Vict., c. 44), s. 7—General Rules under Solicitors' Remuneration Act, 1881, r. 2 (a), (b), (c); Sched. I., Part II.*

Negotiations for a lease were carried on through the lessor's solicitor for two years before the rules under the Solicitors' Remuneration Act, 1881, came into operation. After they came into operation terms were come to, and a lease executed. The solicitor in his bill charged for the negotiations, and also charged the amount fixed by Sched. I., Part II., to the rules, as remuneration "for preparing, settling, and completing lease and counterpart." The Taxing Master disallowed all the items for negotiations, and Mr. Justice Chitty affirmed his decision. The solicitor appealed:—

Held, by the Court of Appeal, that though the business had been commenced before the rules came into operation the taxation must be conducted according to the rules, the solicitor not having declared his election to the contrary.

Whether he might, on the rules coming into operation, have effectually declared such election, *quære*.

Held, further, that, having regard to rule 2, the amount fixed by Sched. I., Part II., included the charges for negotiations, and that the appeal must be dismissed.

MR. ELLIS, being entitled to a lease of Adelaide House, at St. Leonards, for a term which would expire in 1888, commenced in August, 1880, negotiations for a renewed lease. The negotiations went on through Mr. Field, the solicitor for the lessors. On the 24th of April, 1883, written heads of terms of lease were finally agreed to. The lease was to be for twenty-seven years from Michaelmas, 1882, at £300 a year during the first six years, and £325 for the rest of the term. The last clause of the terms was, "The landlords and tenant to respectively execute a lease and counterpart, to be prepared by the landlords' solicitor upon the terms aforesaid, and the reasonable costs and expenses of the landlords in relation to the negotiations and the lease to be paid by the tenant."

In October, 1883, the new lease was executed, and on the 19th Mr. Field sent in to Mr. Ellis his bill of costs. This bill contained

charges from August, 1880, to the 24th of April, 1883, amounting in all to £16 5s. 2d., for costs in respect of the negotiations. The preparing, settling, and completing of the lease and counterpart were then charged—£13 2s. 6d.—according to the scale in Sched. I., Part II., to the rules under the Solicitors' Remuneration Act, 1881. The total of the bill, including expenses of valuer, stamps, &c., was £66 12s. 2d.

Mr. Ellis, being dissatisfied with the bill, obtained, on the 13th of December, 1883, an order to tax it. The Taxing Master struck out the costs in respect of the negotiations, thus reducing the bill to £50 7s., from which he taxed off £18 3s. 8d., leaving £32 3s. 4d. Among the items disallowed were charges by the solicitor for a journey by him to St. Leonards to see the property with the valuer, and a journey to Walmer to procure the execution of the lease. The Taxing Master also disallowed a charge for preparing heads of terms of the lease, and reduced the charges of the valuer.

Mr. Field carried in objections, of which those only relating to the charges connected with the negotiations need be noticed. He objected to the disallowance of them:—

1. Because the agreement between the parties states "that the reasonable costs and expenses of the landlords in relation to the negotiations and the lease are to be paid by the tenant." By striking out all the items prior to the item for preparing lease no effect is given to the express mention of the negotiation.

2. Because upon the true construction of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, the scale of charges in Part II. of Sched. I. thereto does not include the negotiations for a lease. Under clause 2, sub-sect. (c), of such Order, therefore, negotiations for a lease are business the remuneration for which is not thereinbefore or in Sched. I. thereto prescribed, and, therefore, the remuneration for the same is to be regulated according to the former system as altered by Sched. II. thereto.

3. Because the negotiations in the present case having been begun and for the most part carried on before the 31st of December, 1882, are not subject to the said General Order.

4. Because a solicitor is never to be compelled to be remunerated

C. A.
1885.

by scale without having an option of electing to be remunerated in detail under clause 6 of the said Order, and in the present case it would not have been possible for the solicitor to make any such election before commencing the negotiations, the said General Order not being then in operation or existence.

The Master disallowed the objections, and gave the following reason as regarded objection 2 :—

“The language of Part II., about scale of charges as to leases, &c., must be read in connection with the language of Order 2 (*b*). This (*b*) obviously means that the scale-charge for the lease shall cover the whole transaction.

“If the solicitor is not satisfied with the scale charge he may avail himself of Order 6, but he must do so by writing communicated to the client.”

Mr. Field took out a summons to review the taxation, which was adjourned into Court, and heard by Mr. Justice Chitty on the 24th and 25th of March, 1885.

Juce, Q.C., and A. W. Rowden, in support of the summons :—

1. It is provided by the agreement of April, 1883, that the items which have been struck out, being costs incurred by the lessor “in relation to the negotiations,” shall be paid by the lessee.

2. The scale of charges in Part II. of Sched. I. to the General Order under the Solicitors’ Remuneration Act, 1881, does not include negotiations for release, and, therefore, under Rule 2 (*c*), this is business the remuneration for which is not thereinbefore or in Sched. I. thereto provided; and the remuneration must be regulated according to the former system as altered by Sched. II. thereto.

3. These negotiations having commenced and been, for the most part, carried on before the 31st of December, 1882, are not regulated by the General Order, which is not retrospective.

The solicitor ought not to be compelled to accept the scale remuneration without the opportunity of electing to be remunerated in detail under Rule 6; but here, as the General Order was neither in operation nor in existence before the negotiations were undertaken, the solicitor could not have made his election.

As this is a third-party taxation, the third party places himself

in the position of the client, and can take objection to nothing that the client could not himself object to: *Re Massey* (1).

C. A.
1885.

Romer, Q.C., and J. D. Davenport, contra:—

There is nothing special about this case to justify so high a bill; and the items are, for the most part, quite inadmissible. The employment of a solicitor on behalf of the lessor in the preliminary negotiations was quite unnecessary, the solicitor's duty commencing only with the preparation of the lease. As the General Order does not provide for the payment of any fee to the solicitor for negotiations which result in the granting of a lease, it must be considered that the scale fee fixed for the preparation of a lease and counterpart was intended as a sufficient recompense to the solicitor for his trouble. They cited *Raymond v. Lakeman* (2).

Ince, in reply.

CHITTY, J. :—

The Taxing Master was, I think, right in his view. The question is, whether a solicitor, in addition to the scale charge for a lease, can also charge for the preliminary negotiations which resulted in that lease. The scale of charges in Schedule I., Part I., which relates to sales, purchases, and mortgages, contains allowances to solicitors for negotiating a sale of property by private contract and for negotiating a purchase of property by private contract, but no allowance is made for negotiating a lease, the scale of charges in Sched. I., Part II., as to leases mentioning only an allowance to lessor's solicitor "for preparing, settling, and completing lease and counterpart."

In my opinion, the principle upon which the rules and scales of charge were framed was this :—

It was considered that in the case of every lease there must be some negotiation, but that as the scale of charge was intended to fix in a more or less rough manner the remuneration of solicitors, the scale of charges for the lease itself was intended to include all preliminary negotiations and attendances. The solicitor in this case could have given notice under rule 6 that his remuneration should be in accordance with the present system as altered by Sched. II.,

(1) 34 Beav. 463.

(2) 34 Beav. 534.

C. A.
1885.

or he need not have come under these rules at all, because the business was commenced before 1883, and as he did not give notice that he intended to charge according to the scale, it appears to me that he has elected to charge according to the scale charge. Solicitors take these matters for better, for worse. There is, as I have often heard the late Master of the Rolls observe, a kind of give and take in these matters. They get more in one case and less in another and for this reason very likely in settling this scale some sort of rough and ready rule for regulating the remuneration was laid down. I am of opinion that the solicitor is not entitled to charge for the negotiations which preceded the lease. In this case a paper of terms was signed called "Heads of Terms of Lease." It was not intended to operate as a binding agreement for a lease, but merely as instructions from which a lease could be prepared; and the argument that the solicitor was entitled to a double charge—one for these "Heads of Terms of Lease," and another for the lease itself—is not, in my opinion, well founded. As to the amount that the Taxing Master has allowed, the Court does not interfere unless there has been some mistake in principle. With the disallowance of expenses of the journey to St. Leonards of the solicitor and surveyor I cannot therefore interfere, nor shall I interfere with his discretion in refusing the expenses to Walmer. It is not necessary to say more than that the solicitor has failed to make out as a matter of fact that it was necessary. He has shown no special authority on the part of the lessor, so as to prevent the lessor from taxing these items, nor any special agreement to pay this amount. One more observation. The rent reserved by the lease is £325; the lease itself is a very ordinary one, presenting no special difficulties, and I think the solicitor was not justified in bringing in so large a bill—£66 12s. 2d. The Taxing Master has taxed the bill on no illiberal scale, and, taking the business all round, has allowed a sufficient remuneration.

Mr. Field appealed, and the appeal was heard on the 29th of April, 1885.

Ince, Q.C., and *A. W. Rowden*, for the appellant:—

We say, first of all, that the rules do not apply, the business having begun before they came into operation. By rule 6 the

rules are not to apply, where a solicitor elects, before undertaking the business, to be paid according to the old scale; and they cannot apply to a case where, the business having been undertaken before the rules, this option could not be exercised. But supposing the rules do apply, we say that the negotiation is extra work for which the solicitor is to be paid under rule 6 (c). It is work not provided for by Part II. of Sched. I., which gives remuneration only "for preparing, settling, and completing lease and counterpart," not saying anything about negotiations, whereas Sched. I., Part I., expressly provides for them in the case of sales and mortgage. The Sched. I., Part II., provides then for the usual work incident to a lease, leaving negotiations to be paid for under Rule 2 (c) according to the old scale as modified by Sched. II. That subsection provides for recourse to the old scale in a class of cases where there is usually a negotiation through a solicitor, which in the case of ordinary leases there generally is not.

[FRY, L.J.—How can you say that the case is not within the rules when you send in an *ad valorem* charge for the lease and counterpart?]

If the whole transaction is treated as one to which the scale does not apply, it may be that we ought to have sent in a detailed bill on the old footing, but the solicitor might well consider that, as the lease was prepared and executed after the rules came into operation, he ought to give the client the benefit of them as to that. Mr. Justice Chitty in his judgment omits all notice of the fact that Sched. I., Part II., defines and limits the work to be done for the remuneration there mentioned. The decision strikes out of the agreement the charges for negotiation which are expressly mentioned there.

[FRY, L.J.—That is not an agreement with the solicitor.]

Davenport, contra, was desired by the Court to confine himself to the question whether the case came within the rules, the business having been commenced before the Act.

Sect. 7 of the Act evidently imports that the taxation of all bills delivered after the rules come into force is to be according to the rules; and the point was decided in *In re Lacey & Son* (1). *Ante*, p. 238.

C. A.
1885.

Ince, in reply :—

The only just construction is either, that where the business is before the rules the taxation is not governed by them at all, or that the business done after they came into force is governed by them, and the work done before is to be paid for separately.

COTTON, L.J. :—

In this case negotiations for a lease were carried on through the lessor's solicitor for many months before the rules under the Solicitors' Remuneration Act, 1881, came into operation; but a final agreement was come to, and the lease executed after that period. In his bill the solicitor charged for negotiations both before and after the time when the rules came into operation, and also charged the percentage allowed by Sched. I., Part II., to the rules. The Taxing Master struck out all the items relating to the negotiations, and Mr. Justice Chitty affirmed his decision. The solicitor has appealed.

The first ground which he takes is, that the Act does not apply. Rule 6 provides that, "In all cases to which the scales prescribed in Sched. I. hereto shall apply a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by Sched. II. hereto." Here it was said that the solicitor could not exercise his option because the business was in full swing before the rules came into operation, and that the scale therefore could not apply. This argument is forcible; but I think it cannot prevail when we look at the 7th section of the Act—"As long as any general order under this Act is in operation the taxation of bills of costs of solicitors shall be regulated thereby." No doubt the application of the Act to pending business alters the contract under which the business was undertaken, but this alteration may in some cases be for the benefit of the solicitor. It may be that if a solicitor, after the rules came into operation, gave notice that he elected to have remuneration for business then pending according to the old system as modified by Sched. II., we should hold such a notice effectual. Here the solicitor did nothing of the kind, for he claimed percentage under the rules, and we

cannot get out of sect. 7. It has been decided in *In re Lacey & Son* (1) that the rules apply to pending business.

C. A.
1885.

Ante, p. 238.

It was argued that the agreement gave the solicitor a right to more than he could otherwise have claimed, but I do not read it in that way. It appears to me to mean nothing more than that the lessee undertakes to pay the costs of the lessor.

But it is said, assuming the Act applies, that there is no agreement to take the case out of it. Sched. I., Part II., only provides for remuneration for preparing, settling, and completing the lease and counterpart, and does not interfere with costs of negotiations, which can therefore be charged for separately. If we look at the Schedule alone, that argument is forcible; but we must look at Rule 2—"The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, &c., is to be regulated as follows:—(a) In respect of sales, purchases, and mortgages completed the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Sched. I. to this Order, and to be subject to the regulations therein contained. (b) In respect of leases and agreements for leases of the kinds mentioned in Part II. of Sched. I. of this Order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I." The question is, whether negotiations preparatory to the granting of a lease are not business connected with a lease. In my opinion they are, and if so, the charges in respect of them are covered by Part II. of Sched. I., whatever its precise terms may be. This conclusion appears to me to be fortified by Rule 2, Sub-sect. (c):—"In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed . . . the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." This shows that if a lease was not executed there still might be business which could only be in respect of negotiations, and it hence appears that negotiations were

C. A.
1885.

intended to be included in business connected with leases. If the lease is not executed, this business is to be paid for according to the old system as modified by Sched. II.; if it is executed, the solicitor is paid according to the scale. The Act and rules were intended to provide for the fair remuneration of solicitors, and in many cases, I believe, tend greatly to their benefit. Having the benefit they must take the burden.

LINDLEY, L.J.:—

I agree that the decision appealed from is right. Perhaps the most difficult question is whether the rules apply at all to pending business; but sect. 7 of the Act satisfies me that they are applicable. I do not regard it as unimportant that the solicitor claimed the benefit of the rules as to part of the business. He elected to have that part of his work paid for under the new rules, and I am not sure that it does not follow from that election that his whole bill must be treated in the same way.

I think that there is nothing in the argument founded on the agreement; it was a mere agreement that the lessee should pay what the lessor was liable to. The solicitor is to be paid by the lessee, and the only question is, how the remuneration is to be calculated. The only difficulty on the rules arises from the words in Sched. I., Part II., “for preparing, settling, and completing lease and counterpart,” which at first sight seemed to me to be struck out by the decision. The only way of meeting that difficulty is to fall back on the body of the rules, and when we look at Rule 2 (*b*) and (*c*), it is pretty clear what is meant by “business connected with.” The expression includes preparatory negotiations. Then again, if we look at the 5th of the “Rules applicable to Part II. of Sched. I.,” we find that if a lease is granted for a premium the purchase scale applies to the premium. In such a case there can be no doubt that negotiations are included. I agree that the appeal must be dismissed.

FRY, L.J.:—

I am of the same opinion. I think that section 7 of the Act declares in substance that the Act shall apply to all bills which are taxed while the General Orders are in force. If the

Act had not been intended to apply to pending business different language would have been used.

C. A.
1885.

As to the second question, I agree with the other members of the Court. No doubt the Sched. I. is not very easy to construe, but I agree in the conclusion that it was intended to deal with the whole of the business relating to the sales and leases. That is the natural import of the first part of Rule 2. It is true that in clause (b) we find different language, for it speaks of the solicitor "having the conduct of the business." I think that this means of the entire business connected with the lease, and that it ought not to be cut down on the ground that in the schedule the remuneration is expressed to be "for preparing, settling, and completing lease and counterpart." I agree that the appeal must be dismissed.

Solicitors for the appellant: *Soames, Edwards, & Jones.*

Solicitors for respondent: *Freeman & Bothamley.*

In re MERCHANT TAYLORS COMPANY.

(*By permission*, from 29 Ch. D. 209; s. c. 83 W. R. 542.)

Chitty, J.
1885.

April 17.

Sale under Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18; [Revised Ed. Statutes, Vol. ix., p. 628])—Reinvestment of Proceeds—Costs—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order of August, 1882, Sch. I., Pt. I., Rule 11—Scale Charges. Affirmed, *post*, p. 294.

Where land has been compulsorily taken by a railway company in exercise of its statutory powers, and the proceeds of sale have been paid into Court and subsequently reinvested in land, the costs incurred in such reinvestment may be charged for according to the scale fixed by the Solicitors' Remuneration Act, 1881.

The exception contained in Rule 11 of the General Order, Sch. I., Pt. I., does not apply to such costs.

ADJOURNED SUMMONS.—Certain lands belonging to the Merchant Taylors Company having been taken by the Great Eastern Railway Company and other companies in exercise of their statutory powers, the proceeds of sale were paid into Court under the provisions of the Lands Clauses Consolidation Act, and were afterwards reinvested in the purchase of other lands for the Merchant Taylors Company.

Chitty, J.
1885.

The solicitor to the Merchant Taylors Company made out his bill of costs according to the scale charge fixed by the Solicitors' Remuneration Act, 1881, and on taxation these charges were objected to on the ground that the scale charge did not apply as coming within the exception contained in Rule 11 of Schedule I., Part I., of the General Order, which directs that in case of sales under the Land Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, this scale shall not apply.

The Taxing Master held that the solicitor of the Merchant Taylors Company was entitled to charge according to the scale fixed by the General Order, and the railway companies thereupon took out a summons to review his taxation, which was adjourned into Court.

Macnaghten, Q.C., and *Smart*, in support of the summons:—

This is a sale and purchase under the Lands Clauses Act, and comes within the exception mentioned in the latter part of Rule 11, and the scale does not apply.

Romer, Q.C., and *Hood*, for the Merchant Taylors Company:—

The question here is with regard to the purchaser's charges; the vendor is outside the taxation altogether, and there is no question about paying his charges. We submit the Taxing Master is right.

CHITTY, J.:—

The question is whether this case falls within the exception at the end of the 11th rule of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881. [His Lordship read the clause.] The Merchant Taylors Company's land has been taken by several railway companies, and the purchase-moneys, as in the ordinary case, have been paid into Court, and then an application is made and sanctioned by the Court for investment of the moneys in the purchase of other land. The question is with reference to the charges of the Merchant Taylors Company on the purchase that is now being made. The Merchant Taylors Company are the purchasers, and not the vendors. The costs of this purchase fall

under the Lands Clauses Consolidation Act, and must no doubt be paid by the railway company.

Chitty, J.
1885.

Now the question is, whether there is enough in the clause that I have read at the end of the 11th rule to exclude the scale, because the scale applies unless it is excluded. The language is—"In case of sales under the Land Clauses Consolidation Act, or any other public or private Act under which the vendor's charges are paid by the purchaser." It is argued that the words "vendor's charges are paid by the purchaser" do not apply to the Land Clauses Consolidation Act, so that it is said that a transaction which arises in not only the sale but the purchase which takes place under the Lands Clauses Consolidation Act is also included within the exception. That appears to me to be a misreading of the clause, because I think the words "under which the vendor's charges are paid by the purchaser" are words which apply not only to the other Acts which are mentioned, but to the Lands Clauses Consolidation Act, and the reading of this proviso, therefore, is, in case of sales under the Lands Clauses Consolidation Act under which the vendor's charges are paid. But the question here is not with regard to the payment of the vendor's charges, but it is with regard to the payment of the purchaser's charges—that is, the charges of the solicitor of the Merchant Taylors Company. The vendor is some third party outside the taxation altogether. There is no question about paying his charges at all; he has to bear his own, as in the ordinary case. It appears to me that those words are material words, as showing that the proviso at the end of the 11th rule has not this large and extensive signification attributed to it by the railway company, who have asked me to review the Taxing Master's certificate, but has the more restricted meaning which the Taxing Master himself has taken. I hold, therefore, the Taxing Master to be right.

Solicitors: *W. F. Fearn; A. G. Parson.*

Chan. Div.
1885.

May 9.

FLEMING v. HARDCASTLE.

(By permission, from 33 W. R. 776 ; s. c. 52 L. T. 851.)

(Before PEARSON, J.)

Costs—Taxation—Solicitors' Remuneration Act, 1881, (44 & 45 Vict., c. 44), s. 2—General Order of August, 1882, ss. 2, 6—Work begun before but finished after the 31st of December, 1882—Conveyancing Business in an Action—Preparation by Purchasers' Solicitor of Contract of Sale—Election.

A decree for administration of an estate was obtained. The trustees afterwards sold certain pieces of land—part of the estate—to a railway company, and re-purchased from the company part of the lands sold, as having become superfluous land. The conveyancing work was commenced before but finished after the 31st of December, 1882, when the General Order under the Solicitors' Remuneration Act, 1881, came into operation. In the case of the re-purchase from the railway company it was agreed that the purchase by the company, which had not been completed, should not be carried out, and that the trustees should accept such an assurance as would re-vest the land in them. There was no investigation of title, and the solicitor for the trustees prepared the contract.

Held, that the Act and General Order applied to the costs of the trustees in relation to the conveyancing work ; but that they were entitled to charge for the preparation of the contract in addition to the scale fee fixed by Part I. of Schedule I. of the General Order.

In re Field, ante, p. 553, and *Stanford v. Roberts*, 32 W. R. 404, 26 Ch. D. 155, followed.

Ante, p. 278.

Ante, p. 248.

THIS suit was commenced in June, 1872, by John Edward Arthur Willis Fleming, an infant, by Edward John Treffry, his next friend, against Joseph Alfred Hardcastle, Edward Lambert, William Bigoe Buchanan, John Horton, and Ida Mary Sheldon Fleming, for the purpose of making the infant plaintiff a ward of court, obtaining a scheme for his maintenance and education, and for the management of his property under the direction of the Court. The defendant Ida Fleming was the mother of the infant plaintiff. The other defendants were trustees of the Fleming estates, to which the infant plaintiff was entitled as tenant in tail in possession. A decree in accordance with the prayer in the bill in the suit was obtained on the 22nd of June, 1872.

By a memorandum of agreement made on the 10th day of January, 1882, between William Mosse, of the one part and

Joseph Alfred Hardcastle and Edward Lambert, by Richard Pink, their agent, of the other part, a piece of land at Southampton was contracted to be sold to Hardcastle and Lambert for the sum of £1,050. This contract was approved by the Court on the 19th of April, 1882; but the purchase was not completed until the 7th of March, 1883.

By articles of agreement made the 13th day of November, 1882, between the Isle of Wight (Newport Junction) Railway Company, of the one part, and Horncastle and Lambert, by Richard Pink, their agent, of the other part, a piece of land, forming part of the superfluous land of the company, was contracted to be sold to Hardcastle and Lambert for the sum of £60. This contract was approved by the Court on the 3rd of February, 1883, but the purchase was not actually completed until the 29th of May, 1883. Part of the land comprised in this agreement had been sold by defendant to the company under their statutory powers, but the purchase by the company had never been completed, and the agreement provided that the purchase should not be carried out, but the defendants should accept such assurance as would revest the property in them, and no investigation of title was made with reference to the property repurchased by the company. Considerable negotiations took place with respect to this agreement.

By an agreement made the 16th of June, 1883, between Pink, as agent for Hardcastle and Lambert, of the one part, and Frederick Julius Macaulay, as agent for the London and South Western Railway, of the other part, a piece of land at Southampton was agreed to be sold to the company for the sum of £25. This contract was subsequently approved by the Court.

On the 6th of December, 1883, an order was made for taxation of the defendants' costs incurred in relation to the above transactions.

The Taxing Master disallowed a considerable number of items, and cut down other items.

On the 16th of February, 1885, certain objections to taxation were made by the defendants, but disallowed by the Taxing Master; and the defendants thereupon took out the present summons, asking for a review of taxation.

The questions to be decided were:—(1) Whether the Solicitors'

Chan. Div.
1885.

Remuneration Act, 1881, and the General Order of August, 1882, made thereunder, applied to the costs of business commenced before, but concluded after, the 31st of December, 1882, when the order came into operation; (2) Whether the Act and Order applied to conveyancing business done in an action; (3) Whether the defendants' solicitor, by sending in his bill made up in accordance with Schedule II. of the Order, elected, at the earliest opportunity, under sub-section 6 of the Order, to charge according to Schedule II.; (4) Whether the Order applied since the whole of the business to which the scale fee prescribed by Part I. of Schedule I. relates had not been performed, as the whole of the title of the property purchased has not been investigated; and (5) Whether, as the purchaser's solicitor had prepared the agreement of the 13th of November, 1882, although the scale fee does not, in the case of the purchaser's solicitor, mention the preparation of the contract, he was entitled to charge for so doing in addition to the scale fee.

S. Dickinson for the defendants:—

The Act and General Order do not apply to costs for work done before the 1st of January, 1883: General Order of August, 1882, sub-section 2 (c). In the case of *In re Lacey* (1), the work done was not commenced before the Act came into operation. The Act is not retrospective: *Ward v. Eyre* (2). In the case of *In re Field* (3) the solicitor sent in his bill according to the scale in Schedule I., Part II., and was consequently prevented from objecting. The Act and Order do not apply to conveyancing business done in an action: *Stanford v. Roberts* (4). The defendants' solicitor by sending in his bill made up according to Schedule II. of the General Order, elected to be remunerated under the old system as altered by Schedule II.: General Order of August, 1882, s. 6. The General Order does not apply, because the whole of the work to which the scale fee prescribed by Part I. of Schedule I. relates was not performed, since the title to the property was not investigated: *In re Lacey*. [He also referred to *In re Denne* (5)]. The

Ante, p. 238.
Ante, p. 266.

(1) 32 W. R. 233, 25 Ch. D. 301.

(4) 32 W. R. 404, 26 Ch. D. 155.

(2) 28 W. R. 712, 15 Ch. D. 130.

(5) 29 S. J. 28.

(3) *Ante*, p. 553

defendants' solicitor is entitled to remuneration for the preparation of the agreement of the 13th of November, 1882, although the scale does not, in the case of the purchasers' solicitor, mention the preparation of the contract.

Chan. Div.
1885.

Cookson, Q.C., and *W. Latham*, for the plaintiff.

PEARSON, J. :

I am of opinion that I am bound by decision of the Court of Appeal in the case of *In re Field*. It has been contended that, *Ante*, p. 278. inasmuch as the work to which the costs in question relate was commenced before the 31st of December, 1882, when the General Order of August, 1882, made under the Solicitors' Remuneration Act, 1881, came into operation, the old fees are chargeable for work performed before that date, while the new scale applies to work done subsequently. This would have occasioned great difficulty, for the Taxing Master would have had to decide what work was before and what after the 31st of December, 1882. But it has been settled by the Court of Appeal that the Order applies where the taxation takes place subsequently to the 31st of December, 1882, and I must follow that decision, and hold that the Taxing Master has taken a right view of the case. The next question is whether the Act and Order apply to conveyancing work done in an action. This has been decided in the case of *Stanford v. Roberts*, *Ante*, p. 248. with which I agree, and I hold that the Act and Order apply to conveyancing work transacted in an action equally with other conveyancing work. Then it was urged that, as the work was done in an action, the defendants' solicitor, by sending in his bill made out according to the old system, as altered by Schedule II. of the Order, had elected, under section 6 of the Order, at the earliest opportunity, to charge according to the old system, as altered by Schedule II. To my mind that was no election at all. A solicitor must elect before he commences the work, and it is too late to elect when he sends in his bill. It was also contended, on the authority of *In re Lacey*, that Schedule I. does not apply to *Ante*, p. 238. the charges in relation to the agreement of the 13th of November, 1882, because there was no investigation of title by the defendants except as to a small part of the property comprised in it. But

Chan. Div.
1885.

Ante, p. 278.

the title was investigated so far as investigation was necessary, and I think that, substantially, the title was investigated, and that the remarks of Fry, L.J., in *In re Field* covered this case. The costs of the preparation of the agreement of the 13th of November, 1882, ought to have been allowed. As the solicitor for the defendants—the purchasers prepared the agreement—he is entitled to charge for so doing in addition to the scale fee, which does not, in the case of the purchasers' solicitor, include the preparation of the contract. The objections must be overruled, except that the costs of the preparation of the agreement of the 13th of November, 1882, must be allowed. The costs of this application will be costs of the action.

Solicitor: *Richard Petch.*

Appeal.
1885.

June 2, 17, 20.

In re MERCHANT TAYLORS COMPANY.

(By permission, from 30 Ch. D. 28; s. c. 33 W R. 693, 52 L. T. 775, 54 L. J. Ch. 867.)

Reinvestment under Lands Clauses Consolidation Act, 1845 (8 & 9 Vic., c. 18)
[*Revised Ed. Statutes*, vol. ix., p. 628]—*Costs—Solicitors' Remuneration Act, 1881 (44 & 45 Vic., c. 44), s. 2—General Order of August, 1882, rule 2, Schedule I., Part I., rule 11.*

Money arising from the sale of land belonging to a corporation, and taken by a railway company under their statutory powers, was reinvested in land under the direction of the Court. The solicitor of the corporation charged the *ad valorem* scale fee prescribed by the rules under the Solicitors' Remuneration Act, 1881, Schedule I., Part I., "for investigating title and preparing and completing the conveyance:"—

Held (affirming the decision of Chitty, J.), that the exception in Sched. I., Part I., rule 11, which provides that the scale shall not apply in case of sales under the Lands Clauses Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, was not applicable to the case.

Ante, p. 248.

Held, also (approving the decision of Kay, J., in *Stanford v. Roberts*, 26 Ch. D. 155), that the words of rule 2—"not being business in any action or transaction in any Court or in the Chambers of any Judge or Master"—apply only to the "other business" mentioned immediately before—*i.e.*, to business not being conveyancing business, and do not exclude from the scale conveyancing business done under the direction of the Court.

Held, also, that as the purchaser's solicitor had had to do all the things

which he would have had to do in a purchase not under the direction of the Court, the case was not taken out of the scale by the fact that, in a purchase under the direction of the Court, he did not incur as much responsibility as in a private purchase :—

Appeal.
1835.

Held, therefore, that the scale fee was properly chargeable.

THIS case came before the Court of Appeal from a decision of Mr. Justice Chitty (1).

Ante, p. 287.

Lands belonging to the Merchant Taylors Company had been taken partly by the Great Eastern Railway Company and other railway companies, and partly by the Metropolitan Board of Works, under their statutory powers, and the purchase-moneys had been paid into Court. These moneys were reinvested under the direction of the Court in the purchase of an estate, the title to which was investigated in Chambers in the ordinary way. The solicitor of the Merchant Taylors Company made out his bill of costs relating to this purchase on the footing of the scale in the order made under the Solicitors' Remuneration Act, 1881, Sched. I., Part I., charging the *ad valorem* amount there prescribed for investigating the title and preparing and completing the conveyance. The railway companies objected to this charge, contending that the case was within the exception in the latter part of the 11th rule to Sched. I., Part I. :—"In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply." The Taxing Master allowed the charge. The railway companies took out a summons to review his taxation. Mr. Justice Chitty agreed with the Taxing Master, and dismissed the summons. The railway companies appealed.

The Metropolitan Board also presented a similar appeal.

W. Pearson, Q.C., and *F. Pownall*, for the Metropolitan Board of Works, and *Macnaghten, Q.C.*, and *Smart*, for the railway companies :—

June 2.

We contend that the rules under the Solicitors' Remuneration Act do not apply to this particular business. The 11th of the rules in Sched. I. says that the scale shall not apply to cases of sales under the Lands Clauses Consolidation Act, or any other

(1) 29 Ch. D. 209.

Appeal.
1885.

private or public Act under which the vendor's charges are paid by the purchaser.

[COTTON, L.J.—Nothing is said there about purchases.]

We submit that in carrying out the 80th section of the Lands Clauses Act there must be the same scale of costs throughout the transaction, including the reinvestment in land. The 80th section of the Lands Clauses Act puts all the costs together—those relating to the purchase of land by the company and those relating to its reinvestment, and in taxation under section 83 a distinction cannot be drawn between one transaction covered by section 80 and another. The word “sales” in rule 11 carries with it everything that follows from the sale, and the reinvestment is a result of the sale. Another view is this:—A purchase from a person who can convey only by virtue of the Lands Clauses Act is not a purchase for money; it is a purchase for money which is to be treated as land, and is only temporarily invested in consols. Until it has been reinvested in land the sale is not complete. It is, in fact, an exchange. Then we say that rule 2 of the Order excludes this business as it was transacted in Chambers. The words “not being business transacted in any Court, &c.,” must apply to the whole of what goes before, otherwise they have no sense, as the Order does not provide for anything but conveyancing business.

Ante, p. 248. *Stanford v. Roberts* (1) cannot, we submit, be sustained, neither can it be sustained on another ground; the solicitor here did not investigate the title within the meaning of the scale, it was investigated by the Chief Clerk.

Romer, Q.C., and *Hood*, for the Merchant Taylors Company:—

The argument for the appellants comes to this, that in rule 11, instead of “sales,” we are to read “purchases or sales.”

[COTTON, L.J.—There is another question, whether the solicitor has done the business for which by rule 2 remuneration according to the scale is provided. As the investigation of title was in Chambers, did he within the meaning of rule 2 investigate the title?]

He investigates the title in the same way as he does in any other case in which the abstract is sent to counsel. He goes

through exactly the same process in the one case as in the other, with this exception, that in a purchase in Court he has to go before the Court and do things which he would not have to do on an ordinary sale.

[FRY, L.J.—Take this entry: “Writing Messrs. Pilgrim requesting them to produce to the Chief Clerk” a certain document. In an ordinary sale the solicitor would have the responsibility of seeing whether it was duly executed. In the present case the Chief Clerk would see to it. Then, again, there is an entry as to attending the Chief Clerk to approve the conveyance. In a sale out of Court the solicitor would do that for himself.]

No doubt the solicitor’s responsibility is to some extent lessened, but he has just the same amount of trouble. The Chief Clerk does not take the business out of his hands.

[COTTON, L.J.—The object of the rules was only to deal with the remuneration for conveyancing business. What, then, was the object of the words “not being business in any action or transacted in any Court, &c.,” unless it was meant to exclude conveyancing business done in Court or in Chambers?]

The objection that the solicitor had not investigated the title within the meaning of the rules was not taken in the objections, and cannot now be raised.

THE COURT thought that it would be the fairest course that the objections should be amended, so as distinctly to raise this point, and leave was given so to amend and take the opinion of the Taxing Master, after which the case was to come back direct to the Court of Appeal.

The objections were accordingly amended by adding the following objection to the allowance of the scale fee:—

“(A 2). Because the conduct of the inquiry directed by the above-mentioned order whether a good title could be made to the lands therein mentioned was not an investigation of title within the meaning of Sched. I. to the General Order, made in pursuance of the Solicitors’ Remuneration Act, 1881.”

The Taxing Master disallowed the objection, and gave the following reasons:—

Appeal.
1885.
Ante, p. 248.

Ante, p. 290.

“(A 2). It was decided by Mr. Justice Kay in *Stanford v. Roberts* (1) that the scale of charges in Sched. I., Part I., to the Order referred to in the amended objection, applies to conveyancing business transacted in an action; and Mr. Justice Pearson, in *Fleming v. Hardcastle* (9th May, 1885), expressed his concurrence in the decision of Mr. Justice Kay.

“It has, ever since the Solicitors’ Remuneration Order came into operation, been the invariable practice in the Taxing Master’s Office to apply ‘the scale’ to all sales and purchases made by the direction or with the approval of the Court, and to allow, in addition to ‘the scale fees,’ the fees prescribed by the rules of the Supreme Court, 1883, for the extra work occasioned by the intervention of the Court.

“The course of the business (*i e.*, the work done by the solicitor) *for which the scale fee is allowed*, is precisely the same whether or not the sale or purchase is carried out under the direction of the Court, except that, when the approval of the Court is necessary, the conveyancing counsel employed is selected by the Court instead of by the solicitor.

“In both cases the vendor’s solicitor draws the contract, draws the abstract of title, produces the deeds for examination with the abstract, answers the requisitions on title, peruses the conveyance, hands over the conveyance and title-deeds on completion, and makes and carries on (on the part of the vendor) all the attendances and correspondence arising out of the sale.

“And the purchaser’s solicitor peruses the abstract and examines it with the deeds, prepares the requisitions grounded on the opinion of the conveyancing counsel on the title, draws and engrosses the conveyance, makes the searches for judgment, &c., receives the conveyance and the title-deeds on completion, and makes and carries on (on the part of the purchaser) all the attendances and correspondence arising out of the purchase.

“All the foregoing business is covered by the ‘scale fee,’ whether the sale or purchase takes place ‘in Court’ or ‘out of Court.’

“The additional work created by the intervention of the Court consists of the preparation of two or three affidavits and of a Chief Clerk’s certificate, a few attendances on the Chief Clerk, the drawing up of one or more orders, and (in case of a sale) of an

advertisement in the *London Gazette*. For this extra work the fees prescribed by the rules of the Supreme Court, 1883, are allowed. I cannot see any reason why the intervention of the Court should operate to deprive a vendor or purchaser of the great benefit which results from the application of 'the scale;' and 'the scale' applying (*Stanford v. Roberts* (1) and *Fleming v. Hardcastle*) to sales and purchases effected in the course of an administration, action, or other similar proceeding, I am unable to draw a distinction between the ordinary case and a case in which, as in the present, the purchase sanctioned by the Court has to be completed out of a fund paid into Court under the Lands Clauses Consolidation Act.

Appeal.
1885.

Ante, p. 248.
Ante, p. 290.

"It is to be observed that should the decision in *Stanford v. Roberts* (1) be overruled, the scale will cease to be applicable to leases of property under administration by the Court, so that, whenever a lease is granted with the approval of the Court, the costs will, instead of being a gross sum easily ascertainable in advance (a matter of no small moment to the lessee, upon whom the costs generally fall), consist of a series of charges in detail increased by the operation of the 2nd Schedule to the Remuneration Order. The result will be that the cost of a lease granted by the Court will, in the majority of cases, greatly exceed the cost of a lease of property of the same rental value not administered by the Court, the work done (exclusive of the attendances on the Chief Clerk and the preparation of affidavits, certificates, &c., the costs of which are costs in the action, and not paid by the lessee) being the same in both cases."

F. Pownall, for the Metropolitan Board of Works:—

June 17.

The Taxing Master has gone on *Stanford v. Roberts*. We say that, assuming that case to be correctly decided, it does not govern the present. We say that the mere conduct by the solicitor of an inquiry in Chambers as to title is not an investigation of the title within the meaning of the schedule. The mechanical part of the business done is no doubt the same, whether the purchase be conducted in Chambers or without the intervention of the Court, but the responsibility of the solicitor is quite different in the two cases.

Appeal.
1885.

First of all, the scale fee includes the perusal and completion of the contract. A purchaser's solicitor conducting a purchase out of Court has to consider whether he will assent to the terms of the contract, having regard to special provisions as to commencement of title, or any other matter, and he must decide on his own responsibility. In the case of a purchase under the direction of the Court he is free from responsibility. The Court decides the question for him. No doubt, in a purchase out of Court, the solicitor frequently consults counsel, but he often has to advise his client whether requisitions suggested by counsel should be insisted upon, and he may have to assume a serious amount of responsibility. In a purchase in Court he is bound by the directions of the Chief Clerk, who acts according to the advice of the conveyancing counsel of the Court. Then, as to the observations at the end of the Taxing Master's answer, if *Stanford v. Roberts* (1) is overruled it must be on the ground that the Act and Orders do not apply to conveyancing business transacted in Chambers, and Sched. II. cannot apply any more than Sched. I., so that the solicitor and client are thrown back upon the scale of charges existing before the Act, not upon that scale as modified by Sched. II. We say then (1) that the matter is not within the Order at all, being business transacted in Chambers; (2) that if it is, there is no item which applies to it, for that this is not an investigation of title by the solicitor; and (3) that "sale under the Lands Clauses Act" includes everything up to and inclusive of the reinvestment in land.

Ante, p. 248.

Romer, Q.C., and *Hood*, for the respondents:—

As to the question whether the 11th of the rules in Sched. I. excludes the transaction, we say that there are two conclusive answers to the appellant's case: (1) that this is not a sale; and (2) it is not a case where the vendor's charges are paid by the purchaser. Then, as to the objection that this is business in Chambers, that depends on the question of construction whether the words, "not being business in any action," &c., apply only to the last antecedent "other business," or to the whole of what goes before. The natural grammatical meaning of the words is to apply them only to the last antecedent, the second "in respect of" breaking

(1) 26 Ch. D. 155.

up the matter into two branches; and there is no reason for departing from the natural construction. The solicitor does the same work in two cases.

Appeal.
1885.

[FRY, L.J.—Surely the responsibility is very different. In a purchase under the Court the solicitor refers all his difficulties to the Chief Clerk.]

There is practically very little difference between the responsibility in a purchase under the Court and a purchase out of Court where he instructs counsel. *Stanford v. Roberts* (1) is a decision *Ante*, p. 248. in our favour, and Mr. Justice Pearson has expressed his agreement with it.

Pownall, in reply:—

The observations of the Taxing Master in *Stanford v. Roberts* *Ante*, p. 248. forcibly put our case, and Mr. Justice Kay arrived at his conclusions with great doubt. Sect. 4 of the Act expressly refers to responsibility as an element to be taken into account.

COTTON, L.J.:—

This is an appeal from the refusal of Mr. Justice Chitty to review the Taxing Master's certificate. The costs were taxed under these circumstances:—Money was paid into Court under the Lands Clauses Consolidation Act by several companies for land taken in pursuance of that Act, and it was to be reinvested. The bill of the costs of the solicitor of the landowner relating to the reinvestment was objected to by the railway companies on the ground that it contained as its first item a percentage charge on the amount of the money to be reinvested, which is admitted to be the proper charge if the case comes within the rules made under the Solicitors' Remuneration Act, 1881, and Sched. I. thereto, being the charge provided by Sched. I. as payable to a purchaser's solicitor "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)." Three grounds of objection were taken. One was that, having regard to Rule 11 in Sched. I., Part I., the schedule did not apply to a case like this, because that rule provides that—"In case of

(1) 26 Ch. D. 155.

Appeal.
1885.

sales under the Lands Clauses Consolidation Act, or any other public or private Act under which the vendor's charges are paid by the purchaser, the scale shall not apply." It was said that that exception ought to be held to apply to the present case on the ground that, although this is the reinvestment of money, yet really it is part of what is referred to by the rule as a sale under the Lands Clauses Consolidation Act, since the sale under the Act involved the reinvestment in land, and therefore reinvestment ought to be considered as included in the words, "in cases of sales under the Lands Clauses Consolidation Act." In my opinion that argument cannot prevail. The terms are distinct. "In cases of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser." That is not the case here. The vendor's charges are not paid by the purchaser. What we are dealing with is, no doubt, a consequence of the sale. But if it had been intended to include not only the costs on sales, but also the costs on reinvestments, it would have been so stated in the rules.

The next ground of objection was, that transactions like this were excluded from the scale by rule 2, which says that "the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any Court or in the Chambers of any Judge or Master, it is to be regulated as follows;" and then it says what the remuneration is to be. It was said that in this case the words "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master" apply not only to the words "other business," but to the entirety of the matters dealt with in this second rule. There is, no doubt, a little obscurity in this rule, and I think the difficulty has arisen in this way—that although the remuneration and charges provided for by the Schedule are simply for what may be called conveyancing business, the rules have adopted nearly all the words of section 2 of the Act which enables rules to be made and a scale to be fixed, not only for such business as is provided for by the rules which have been made, but for other business "not being business in any action or transacted in any Court or in the Chambers of any

Judge or Master, and not being otherwise contentious business." Under the Act I think it clear that what was meant was business other than conveyancing business, and not being business in Chambers or other contentious business, and that the words "not being business in any action," &c., do not apply to the previous part of that section. When we come to the use of the same words in rules which provide only for conveyancing business there undoubtedly is a difficulty. Still, in my opinion, we ought to hold that in the rule these words—"not being business in any action or transacted in any Court or in the Chambers of any Judge or Master"—apply only to what is called other business. The Order had already defined what the business was to be, the fees for which were to be regulated by the Order—viz., "business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing;" and then, I suppose, *ex abundanti cautela*, but causing a difficulty from that very abundant caution, the words are added, "or other business not being business in any action," &c.

The third ground of objection raises a more difficult point. We have already laid down that to entitle a solicitor to the *ad valorem* charge fixed by the Schedule he must do the whole of the things which are mentioned collectively as constituting the business for which the scale fee is allowed. In one case—*In re Wilson* (1)—we had to consider the right of a vendor's solicitor to charge the scale fee "for conducting a sale of property by public auction, including the conditions of sale." We held that although employing an auctioneer did not prevent the scale from applying, because of course the solicitor could not take the bids, yet if substantially the auctioneer did business which was part of the conducting of the sale besides receiving the bids, then the solicitor who employed that auctioneer was not entitled to the scale fee, because he had not done all that was referred to; he had not conducted the sale, he had only done part of the conducting of the sale. Here we have to consider whether the solicitor of the Merchant Taylors Company has, within the meaning of the rules and of the Schedule, investigated the title to freehold, copyhold, or leasehold property, and prepared and completed the conveyance.

(1) 29 Ch. D. 790.

Appeal.
1885.

The question really is whether he has investigated the title. On that we have felt considerable doubt. This objection was not originally taken by the railway company, and Mr. Romer desired that the matter should go back to the Taxing Master, so that this objection should be stated, and that we should have the reasons of the Taxing Master for holding the scale fee to be payable. I must say for myself I am glad that that course was taken, because we have had, in consequence, considerable assistance from the Taxing Master in the reasons which he has given, and which, as I understand, were submitted by him to two at least of the other Taxing Masters, so that he had their assistance; and since then we have also had the assistance of one of the Chief Clerks, who knows what is done in cases of purchases under the direction of the Court. The argument in support of the objections was that the scale of charges is fixed with reference, not only to the work done, but to the responsibility undertaken by the solicitor. Undoubtedly that is so, for, of course, mere doing of work without responsibility would not be paid for at the same rate as work with the responsibility attaching to the due and proper performance of it. It was urged that conducting an inquiry in Chambers as to whether there is or is not a good title does not put upon the solicitor the same responsibility as he is subject to if he himself, not under the direction of the Judge in Chambers, has to investigate a title for anyone who is purchasing. Considerable weight is due to that objection. But then we learn, not only from the Taxing Master's reasons, but from the inquiries which we have made, that a solicitor acting for the purchaser under the direction of the Court does all which he would have to do if he were independently investigating the title, though he has not the same responsibility in the one case as the other. Therefore, in my opinion, as the solicitor acting under the direction of the Judge does everything which he would do in an independent investigation of the title, the case comes within the words of the rules and Schedule, and I do not see any such manifest inconvenience in allowing the scale to be applied to such a case as would justify us in saying that it does not apply. There are, as was pointed out by the Taxing Master, conveniences in allowing the scale to apply to such a case as the present. It reduces matters to something

like uniformity, and it enables parties to know, without difficulty, what will be the charge they will have to bear, whether the investigation is out of Court, or whether it is in Court, by inquiry in Chambers as to the title. In my opinion, therefore, as the case comes within the words (because, as a matter of fact, the solicitor has investigated the title) we ought not to be hindered from so construing the words as to include this case, simply because we think that the solicitor does not incur the same amount of responsibility as if he had acted independently. In my opinion, therefore, the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. The question whether this re-investment of money in land comes within the expression “sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor’s charges are paid by the purchaser,” appears to me one that is very easily disposed of. This is a purchase. It is not a sale under the Lands Clauses Consolidation Act at all, nor is it a sale in which the vendor’s charges are paid by the purchaser. Rule 11 of Schedule I. therefore does not apply.

Now, as to the second rule of the General Order under the Solicitors’ Remuneration Act, it appears to me that the construction which was put upon it by Mr. Justice Kay in *Stanford v. Roberts* (1) *Ante*, p. 248. was right, and that the words “not being business in any action or transacted in any Court, or in the Chambers of any Judge or Master,” do not refer so far back as “business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing,” but are referable, according to the proper construction, to the last antecedent “other business”—that is to say, other than that which is specifically mentioned.

Then there remains only the third point, which is, whether the expression of Schedule I. Part I. “for investigating title” applies to a solicitor who effects a purchase under the direction of the Court, or whether it ought to be confined to a solicitor investigating title under ordinary circumstances. The expression “investigating title” appears to me to be as applicable to the one kind of business

(1) 26 Ch. D. 155.

Appeal.
1885.

as to the other. The Taxing Master states that, in point of fact, so far as the actual investigation of title is concerned, there is no material difference, but it is certainly true that a solicitor, who conducts a sale or has the management of a purchase under the direction of the Court, is relieved to a certain extent, and not to an inconsiderable extent, from responsibility. The responsibility of deciding difficult questions is taken by the Chief Clerk or by the Judge in lieu of the solicitor. But when we come to look at the question whether this ought to make any difference in the construction of the schedule, I am of opinion that it ought not. The scale, if our construction of the rules is right, is, in point of language, as applicable to the one class of business as to the other, and the scale was fixed by persons who knew perfectly well what they were about, and whose duty it was, under the Act of Parliament, in fixing the scale, to consider the skill, labour, and responsibility involved in the business for which the remuneration was fixed. There is no trace of any such thing as varying the scale in individual cases in respect of responsibility incurred in one case and in another. Take the case, for example, of a solicitor employed by an eminent conveyancer. The solicitor comes to a difficulty, and reports it to his client. The client says: "I am willing to take the risk of that." There is nothing that I can find which shows that the solicitor, although exonerated from responsibility in such a case as that, is to be paid otherwise than by the scale. Neither do I see any indication of an intention to make a difference in the charge because the responsibility is less in the cases of sales and purchases in Chambers. I think the Taxing Master is right when he says that the business and work done is at least as onerous. I rather fancy that it is more troublesome than when the sale or purchase is not conducted in Chambers. It is very true there are attendances for which charges can be made; but I do not see any reason to suppose that solicitors are better paid for sales and purchases under the direction of the Court than they are in other cases, and, in fact, I think they are probably rather worse paid.

It appears to me to be of the utmost importance that we should lay down a rule which can be applied readily to matters of business, and not give rise to subtle distinctions which lead to constant embarrassment; and on the true construction of the Act, the rules,

and the scale, it appears to me that the view taken by the Taxing Master is right—that this is a case in which the purchaser's solicitor has investigated the title within the true meaning of Part I., Schedule I., and that the appeal ought to be dismissed.

Appeal.
1885.

FRY, L.J.:—

I am of the same opinion.

With regard to the first point, which arises on the 11th rule, it appears to me to be plain that the investment of money produced by a sale under the Lands Clauses Consolidation Act does not come within the words “In cases of sales under the Lands Clauses Consolidation Act.” Ingenious as was the argument addressed to us on this point, it is one which cannot possibly prevail.

Then with regard to the second question, which arises upon the construction of the words, “in respect of other business not being business in any action or transacted in any Court or in the Chambers of any Judge or Master,” I am of opinion that the same construction must be put upon those words in the Act of Parliament and in the General Order. I, like my brother Judges, have arrived at the conclusion that the words “not being business,” &c., refer to the immediate antecedent “other business,” and are not to be extended as an exception to apply to the whole of the business which is referred to in the previous words of the section of the Act of Parliament and the rules of the General Order. I think that the reasons which have been given, both by my learned brethren and also by Mr. Justice Kay, in the case in which the question first arose, are correct.

Then upon the third point, which is whether the solicitor who assists the Chief Clerk or the Judge in Chambers in answering the inquiry whether a good title can be made, is entitled to the scale fee for investigating the title. I had for some time considerable doubt, but it appears to me that the solicitor, before he can render proper assistance to the Judge in Chambers, must investigate the title, and that, therefore, the business which he transacts is within the words of the scale. I rely also very much upon the statement made by the Taxing Master (and which is borne out distinctly by the statement made to us by the Chief Clerk, whom we have consulted), that “the course of the business—viz., the work done by the

Appeal.
1885.

solicitor, for which the scale fee is allowed—is precisely the same whether or not the sale or purchase is carried out under the direction of the Court, except that where the approval of the Court is necessary the conveyancing counsel employed is selected by the Court instead of by the solicitor.” Undoubtedly it is quite true that the responsibility of the solicitor in assisting the Judge in answering the inquiry is somewhat less than it is when he takes upon himself the investigation of the title for a lay client. But it appears to me that we ought not to draw fine distinctions between the different cases of responsibility of a solicitor investigating title, and that the decision at which we have arrived is a decision not only in accordance with the very words of the scale, but also in accordance with the course of business and the convenience of the suitors of the Court. The appeals, therefore, will be dismissed with costs.

Solicitors: *W. F. Fearn ; A. G. Parson ; R. Ward.*

Appeal.
1885.

June 20.

Re GLASCODINE and CARLYLE.

(*By permission, from 52 L. T. 781.*)

(Before COTTON, LINDLEY and FRY, L.JJ.)

Solicitor and Client—Costs—Mortgage to Secure Balance of Purchase-money—Investigation of Mortgagor's Title—Taxation after Payment—Special Circumstances—Mutual Mistake of Law—Solicitors' Act, 1843 (6 & 7 Vict. c. 73), s. 41—Solicitors' Remuneration Act, 1881, General Order of 1882, Sched. 1, part 1.

When part of the purchase-money is allowed to remain on mortgage of the property sold, the solicitor of the vendor-mortgagee cannot charge the scale fee under Sched. I., part I, of the General Order under the Solicitors' Remuneration Act, 1881, for investigating the mortgagor's title.

But where a fee of £95 was charged for such investigation, under a common mistake of the parties that the scale applied, the Court refused to accede to an application, made after payment, for taxation.

THE Swansea Dry Docks and Engineering Company, Limited, on the 25th May, 1883, agreed to purchase a certain dock for £32,000, of which £20,000 was to be secured to the vendors by a mortgage of the dock.

Messrs. Glascodine and Carlyle acted as solicitors for the vendors, and on their behalf furnished the abstract of title, and acted on their behalf during the investigation of the title and the completion of the sale.

They also prepared the draft and engrossment of the mortgage.

The solicitors of the company procured the execution of the mortgagor, and the mortgage was delivered and the purchase completed at the same time, on the 31st October, 1883.

On the 27th October, 1883, Messrs. Glascodine and Carlyle wrote to the company's solicitor asking for an appointment to complete, and stating that their charges for the mortgage would be £120.

On the 31st of October a clerk of the dock company's solicitor attended at Messrs. Glascodine and Carlyle's offices at Swansea to complete, but the completion stood over till the next day, when the clerk was provided with the money necessary to complete, but not with money enough in addition to pay the stamps on the conveyance and mortgage, or the costs. On being required by Messrs. Glascodine and Carlyle, the clerk gave them the following undertaking on behalf of his employer :—

“As solicitor to the above company, I undertake to obtain and to make to you payment of your costs as mortgagees' solicitors, according to the *ad valorem* scale under the Conveyancing Act, 1881, (*sic.*) in relation to the mortgage for £20,000 to [the mortgagees] herein, and the amount of the stamp duty on the conveyance of the . . . dock, and the said mortgage thereof.”

By their bill of costs, delivered on the 1st of November, 1883, Messrs. Glascodine and Carlyle charged the company in respect of the mortgage—

For investigating title, preparing and completing mortgage for £20,000, £95 ; stamp duty on mortgage, £25 ; total, £120.

This bill was forwarded to the secretary of the company by the clerk to their solicitor, and was paid by their secretary on the 26th November.

On the 20th of May, 1884, the company took out a summons for taxation of the bill, but, Bacon, V.C., was of opinion that the applicants had shown no special circumstance justifying taxation after payment, and dismissed the summons with costs.

The applicants appealed.

Appeal.
1885.

W. Renshaw for the appellants:—

Ante, p. 233.

The respondents have been paid their costs as vendors' solicitors, and have not investigated the title. They are not, therefore, entitled to make the charge for negotiating under Schedule I., part 1, of the Order under the Solicitors' Remuneration Act, 1881, which they claim to be entitled to make: *Re Lacey and Son* (1).

[COTTON, L.J.—The charge is utterly wrong. It is made in respect of work which has not been done, but there has been no fraud.] [LINDLEY, J.—There seems to have been a common misapprehension that the scale applied.] The bill having been paid, it is necessary to show special circumstances to justify taxation. In this case it is unnecessary to prove pressure, as there is gross overcharge amounting to fraud. [FRY, L.J.—That means taking an unfair advantage which no decent man would take.] He also cited *Horlock v. Smith* (2); *Re Strother* (3).

Vernon R. Smith, for Messrs. Glascodine and Carlyle, was stopped on consenting not to press for the costs of the appeal.

COTTON, L.J.:

This is an appeal from a decision of Bacon, V.C., refusing to order taxation of a bill of costs after payment of the bill. In such a case the applicant for taxation must show that the payment was made under special circumstances. Overcharge and pressure are generally the special circumstances alleged, but an overcharge may be of such a nature that payment of the bill may be said to have been obtained by fraud; and that alone, without pressure, would be a special circumstance justifying an order for taxation. Here then is a large charge which the mortgagees' solicitors were not entitled to make because they had not investigated the title. The solicitors of the mortgagees thought that they were entitled to make the charge under the Order under the Solicitors' Remuneration Act, and the solicitor on the other side took the same view. Though the charge was one which the respondents were not entitled to make they were guilty of no misrepresentation. Both sides were

(1) 49 L. T. Rep. N. S. 755; 25 Ch. Div. 301.

(2) 2 My. & Cr. 495.

(3) 30 L. T. Rep. O. S. 63; 3 K. & J. 518.

under a misapprehension as to the law, and in my opinion the appeal must be dismissed, but without costs.

Appeal.
1885.

LINDLEY, L.J.:—

I am of the same opinion. There is no pretence for saying that the respondents were guilty of any fraud, it was a case of misapprehension of the law. Both sides knew the facts, and thought the case was within the scale in the Solicitors' Remuneration Order. This was a wrong charge, but there were no special circumstances justifying taxation of the bill after payment.

FRY, L.J.:—

I am of the same opinion. Without defining "special circumstances," I must say that I think no such circumstances existed in the present case. There is nothing approaching fraud or suppression of facts. Both sides had full knowledge of the facts, and misconstrued the Remuneration Order.

Appeal dismissed without costs.

Solicitors for the appellants: *Pritchard and Sons*, for *F. Vaughan*, Cardiff.

Solicitor for the respondents: *H. C. Lambert*.

GOODBODY & CO. v. GALLAHER.

(*By permission*, from 16 L. R. Ir. 336.)

Q. B. Div.
1885.

June 26, 29.

(Before O'BRIEN and JOHNSON, JJ.)

Defence—Payment into Court for Debt and Costs—Acceptance—Costs—General Order XXX., r. 4—Appendix B., Form 6—Practice.

In an action for a money demand the defendant pleaded an agreement, after action brought, by the plaintiffs to take a certain sum for debt and costs, and brought that amount into Court on foot of debt and costs. The plaintiffs' solicitor served notice on the defendant accepting the sum so paid into Court "in satisfaction of the plaintiffs' claim, in respect of which it was paid in":—

Held, that the plaintiffs were not entitled to any costs beyond the sum lodged in Court.

Queen's Bench. SUMMONS by the defendant for an order that the taxation of the
1885. plaintiffs' costs should reviewed, and that the Taxing Officer be directed to disallow the plaintiffs all costs.

The writ of summons was issued on 2nd day of April, 1885, claiming £42 3s. 4d., price of goods sold and delivered. The defendant entered an appearance.

Messrs. Sharp & Co. of Liverpool, being indebted to the defendant in the sum of £37 15s. 2d., were directed by him to pay that amount to the plaintiffs on account of their demand, which was done on the 28th day of April, 1885, and same was accepted by the plaintiffs in part payment, leaving still due £4 8s. 2d., balance of the sum claimed in the writ of summons. On the 29th day of April, 1885, the solicitor for the plaintiffs wrote to the defendant demanding payment of £7 17s. 3d., being for balance of debt and costs, to which the defendant replied on the 30th day of April, stating that the only amount due was £5 14s. 10d., and sending a cheque for that amount. On the following day the solicitor for the plaintiffs returned the cheque for £5 14s. 10d., declining to receive the defendant's cheque, and requiring a draft for the full amount—£7 17s. 3d.; to this the defendant replied on the next day, sending a draft for £5 14s. 10d., which was returned on the 4th of May. On the 5th day of May the plaintiffs served notice of a motion for final judgment for the sum of £4 8s. 2d., balance of the said sum of £42 3s. 4d. and costs; upon which application the Court made no rule. The defendant delivered his defence on the 22nd day of May, and, amongst other defences, pleaded an agreement after action brought by the plaintiffs to take £43 10s. in discharge of their claim, the payment by Sharp & Co. of £37 15s. 2d., and the tender by the defendant of the said sum of £5 14s. 10d., and the defendant brought into Court the said sum of £5 14s. 10d., and submitted that in no event were the plaintiffs entitled to any further or other sum for debt or costs in the action. On the 9th day of June, 1885, the defendant was served with a notice in the following terms:—

“SIR,—Take notice that the plaintiffs accept the sum of £5 14s. 10d., paid by you into Court in satisfaction of the plaintiffs' claim in respect of which it is paid in.”

The plaintiffs having taken out of Court the money lodged, under the plea as above stated, proceeded to have their costs taxed, and the Taxing Master taxed them up to payment out of the money lodged in Court, and certified them to the sum of £11 0s. 2d. *Queen's Bench.*
1885.

Gordon, for the defendant:—

This is not a plea *puis darrein continuance*, but a plea to the further maintenance of the action. The money paid into Court was, according to the express terms of the plea, paid in on foot of debt and costs, and the plaintiffs, as stated in the notice they served on the defendant, drew it out in satisfaction of the claim in respect of which it was paid in. They are not entitled to any further costs.

Counsel referred to *Garratt v. Quin* (1), “*Bullen and Leake's Precedents of Pleading*,” p. 663; Section 73 of the Common Law Procedure Act, 1853; *Tetley v. Wanless* (2).

Matheson, contra:—

The defendant lodged the money in Court in the ordinary way under General Order, rules 1 and 4. The word “claim” in the form of notice of accepting the money, taken with the rules, means the cause of action relied on by the plaintiff. This form of plea formerly concluded with an undertaking to pay the costs. The rule gives no power to pay money into Court on account of costs.

Gordon, in reply:—

The old plea that concluded with an offer to pay the costs was where the plea did not purport to deal with the costs.

Cur. adv. vult.

The judgment of the Court was delivered by O'BRIEN, J.:—

June 29.

In this case, which involves a point of some novelty and difficulty to a money demand, the defendant has pleaded to the further maintenance of the action by way of accord and satisfaction of the causes of action, and also of the costs, an agreement by which another person was to pay a sum of £37; and he was to pay a

(1) *IR. 2 C. L. 251.*

(2) *36 L. J. Exch. (N. S.) 153.*

Queen's Bench.
1885.

further sum, the latter exceeding by £1 6s. 8d. the balance of the demand, alleging a tender of that further sum, and bringing it into Court. The plaintiffs contend that in such a case, on taking the money out of Court and stopping his proceedings, he is entitled, under Order XXX., rule 4, to have his costs taxed, and the Taxing Officer having adopted that view, we are called upon to review his decision. The defendant, on the other hand, says why should he be subjected to the costs when he has compounded for them by the agreement? The plaintiff claims them by force of the positive terms of the rule; but if the effect of the rule were to give him costs, to which he is certainly not entitled otherwise than by it, that would rather lead to the argument that the rule was not intended to apply to a case in which it could not be separated from such an unjust consequence.

The point was approached, but not necessary to be determined, in the case of *Staffordshire Banking Co., v. Emmott* (1), where there was a composition in bankruptcy after action brought, and the principal question was, whether the defendant was bound to plead that defence to the further maintenance, or could avail of the deed under Section 198 of the Bankruptcy Act to prevent execution on the judgment without any pleading. Baron Bramwell put the case that, if the defendant pleaded the deed, the plaintiff could confess the plea and have his costs; whereas, if he went on to judgment and was put to more costs, he could have none. But he seems not to have adverted to the fact that the deed was a release, not only of the debt but of the costs; and the editors of "*Bullen and Leake's Precedents*" have noted the very point now in issue, by the observations made on that case, that it seems doubtful how far the Rule can apply to a plea of composition under the Bankruptcy Acts, releasing all actions and costs as well as debts. Substitute plea for deed of release, and we have the exact case at present.

Now, I would like it to be considered whether it is possible at all in law to make the agreement relied on in this defence; for, unless it be impossible, it must be capable of having effect given to it in some way. But it is so far from being impossible that, in *Crowther v. Farrer* (2); an action was brought to enforce the

(1) L. R. 2 Ex. 208.

(2) 15 Q. B. 677.

very terms of the agreement of compromise, and held to be maintainable on the principle that the agreement was an extinction of the original action. And the casual observation of Lord Campbell in that case, that the question was not on a plea to the further maintenance of the action, but whether there was legal consideration for the agreement, is met by the observations of judges in other cases, which treat the effect of the new agreement as the same for either purpose. Trying to find my way out of the supposed logical dilemma that is presented to us, I consider the true solution of the matter to be, that the rules as to the payment of money into Court and taking it out do not apply at all to this case. The money is not paid into Court in respect of plaintiffs' claim, but in respect of the new agreement; it is not paid in upon a plea of tender, because tender has the same meaning in the Rule that it has in the usual language of pleading, and that means tender before action brought; it is not paid in in satisfaction of the cause of action, but of a contract by which the cause of action is displaced. Plaintiffs' counsel, indeed, contends that the payment into Court was erroneous; but it would seem from that to follow necessarily that the Rule can only give costs on taking it out when the payment is properly made. The result is that the plaintiffs have, in fact, the money which was agreed to be paid, and that is the same thing as if the money were handed over to them when the agreement was made. If they challenge the case, that the accord was in respect of the costs as well as the cause of action, they could have gone on and tried the issue on the defence, and would have been entitled, as in *Cooke v. Hopewell* (1) to judgment for nominal damages and the costs. Not challenging it, they must be taken to admit it is true, and to give them the costs, when by the confessed agreement they have given them up, would be simply iniquitous absurdity.

Solicitor for the plaintiffs: *Goodbody.*

Solicitor for the defendant: *T. Carey.*

Appeal.
1885.

Oct. 27.

HUMPHREYS v. JONES.

(1881. H. 1954.)

(*By permission*, from 81 Ch. D. 30; s. c. 34 W. R. 1, 53 L. T. 482, 55 L. J. Ch. 1).

Solicitor—Costs—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), s. 2—General Order, August, 1882, r. 2, sub. s. (c.)—Partition Action—Costs of Defendants' Solicitors—Conveyancing.

In a partition action an order was made for the sale of the estate, and payment of the costs of all parties out of the proceeds. The plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale, and his solicitor was paid his costs in accordance with Rule II., sub-sect. (a) of the General Order under the Solicitors' Remuneration Act, 1881 :—

Held, (reversing the decision of Bacon, V.C.), that the solicitors of the defendants, who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance and obtaining its execution by their clients under Rule II., sub-sect. (c).

THE action in this case was brought for the partition of an estate, and an order was made by Vice-Chancellor Bacon for the sale of the estate and for payment of the costs of all parties out of the proceeds.

The plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale. The defendants, who were entitled to the remaining three-fourths, appeared by two separate solicitors. The plaintiff's solicitors claimed costs, as the vendor's solicitors, under Part I. of Schedule I. of the Solicitors' Remuneration Order of August, 1882, and these costs were allowed by the Taxing Master.

The defendants' solicitor claimed the costs of perusing the conveyance on behalf of their respective clients, and for obtaining the execution of the conveyances by them, on the scale laid down in Schedule II. of the Order. The Taxing Master disallowed these charges, and in his reply to the defendants' objection gave his reasons as follows: "The plaintiff and defendants were tenants in common and all of them vendors. As such they are entitled to one scale charge under Schedule I. of the General Order made in pursuance of the Solicitors Act, 1881, and no more. On the sale they should have but one solicitor."

The Vice-Chancellor, on the matter being brought before him, affirmed the decision of the Taxing Master, and the defendants appealed.

Appeal.
1885.

Maidlow, for the Appellants:—

The question turns upon the construction of the 2nd Rule of the General Order under the Solicitors' Remuneration Act, 1881. That Order has been held to comprise business done in connection with the sales under the Court as well as those out of Court: *Stanford* *Ante*, p. 248. *v. Roberts* (1). That being so, the plaintiff's solicitors, having the conduct of the sale, have been remunerated under sub-sect. (a) of that rule; and the solicitors for the defendants claim to be remunerated under sub-sect. (c) according to the scale of charges in Schedule II. Under the old system there is no doubt they would have been entitled to these charges, and sub-sect. (c) provides that "in respect of all other business the remuneration for which is not hereinbefore, or in Schedule I., hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." A mortgagee is entitled to his costs of joining in a conveyance; *In re Beck* (2); and, on the same principle, the owner of a share in an estate which is sold is entitled. *Ante*, p. 235.

Russell Roberts, for the plaintiff:—

The first part of Rule 2, sub-sect. (c) which refers to sales, mortgages, &c., only provides for the remuneration of the solicitor having the conduct of the business. The last part does not apply to business connected with sales, &c. Therefore the appellants do not come within either part. In the present case there was no occasion for the defendants to employ separate solicitors. They were all vendors, and the plaintiff's solicitor represented them all. That would have been the case under the old practice: *Dixon v. Pyner* (3); *Dale v. Hamilton* (4). And under the present practice, Order LV., rule 40, recognises the same principle by giving power to the Judge to appoint one solicitor to represent all parties.

(1) 26 Ch. D. 155.

(2) 24 Ch. D. 608.

(3) 7 Hare, 331.

(4) 10 Hare, App. vii.

Appeal.
1885.

BAGGALLAY, L.J.:

Ante, p. 248.

I am of opinion that this appeal must be allowed. Under the old system in similar circumstances the defendants' solicitors would have been allowed their charges. In the present case the charges have been disallowed, and if that disallowance is proper it must be so under the Solicitors' Remuneration Act, 1881, and the Order made in pursuance of it. That Act gave power by the 2nd section to the Lord Chancellor and certain other persons to make a General Order "regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master." Then it became a question whether the words of that section had reference to sales made under an Order of the Court in an action as well as those made out of Court, and it was decided by Mr. Justice Kay in *Stanford v. Roberts* (1), that the clause applied to all sales whether made under an Order of the Court or not. That decision was not appealed from, and I entirely approve of it. The introductory part of the 2nd Rule of the Order, which was made in pursuance of the section of the Act, follows the words of that section, and provides that the remuneration of a solicitor in respect of business connected with sales, &c., and in respect of other business not being business in any action or transacted in any Court, or in the Chambers of any Judge or Master, shall be regulated as laid down in three sub-sections. Sub-sect. (a) relates to the remuneration of the solicitor having the conduct of completed sales and mortgages. Sub-sect. (b) relates to the remuneration of solicitors having the conduct of completed leases or agreement for leases; and then sub-sect. (c) is as follows. [His Lordship read the sub-section.] I think that this sub-section comprises all the business referred to in the introductory words of the rule which is not included in sub-sects. (a) and (b), and that it applies exactly to the present case. I am, therefore, of opinion that the Taxing Master was wrong in his decision, and that the defendants' solicitors are entitled to the remuneration which they claim. The Taxing Master appears to have thought

(1) 26 Ch. D. 155.

that the plaintiff's solicitor acted for all parties. I do not think that is correct. The appeal must be allowed.

Appeal.
1885.

BOWEN, L.J.:—

I agree, and for the same reasons.

FRY, L.J.:—

I am of the same opinion.

Solicitors: *Bolton, Robbins, Busk & Co.; Chester & Co.*

In the Matter of the RIVER BANN NAVIGATION ACT,
1879; *Ex parte* OLPHERTS.

M. R.
1886.

Feb. 8, 22.

(By permission, from 17 L. R. Ir. 168.)

Costs—Taxation—Perusal of Deeds in Abstract of Title—General Order under Solicitors' Remuneration Act, 1881, Sch. II.

Under an order to tax the costs awarded to the owner of lands compulsorily taken by a company his solicitor is not entitled to 1s. per folio for perusing deeds referred to in the abstract of title furnished.

The General Order made in pursuance of the Solicitors' Remuneration Act, 1881, Schedule II., does not apply to such taxation.

MOTION to review the taxation of a bill of costs in respect of certain items disallowed by the Taxing Master. The order under which the taxation was had and the items are stated in the judgment.

Mr. Shekleton, Q.C., for the petitioner, referred to *In re Ante*, p. 273. *Parker* (1).

Mr. Matheson, for the Coleraine Harbour Commissioners:—

The arguments on both sides are referred to in the judgment.

THE MASTER OF THE ROLLS:—

This case comes before me on an appeal from the decision of the Taxing Master, disallowing certain items in a bill of costs. The

Feb. 22.

Rolls.
1886.

question arises as follows:—Richard Olpherts was tenant for life of certain lands taken by the Coleraine and River Bann Navigation Company under the Lands Clauses Consolidation Act, 1845, the provisions of which are incorporated in their Act—the River Bann Navigation Act, 1879. The solicitors for the company called on Mr. Olpherts for an abstract showing his title as tenant for life, and he presented a petition, on which an order was made, directing the purchase-money, £859 18s. 4d., to be invested in Three per Cent. Stock, and the dividends to be paid to the petitioner till further order, the company to pay to him the costs of the petition and order and proceedings thereunder, together with all costs properly and necessarily payable under the provisions of the Lands Clauses Consolidation Act, 1845. Under that order the costs of the abstract were drawn by the petitioner's solicitor, who was probably the solicitor for the family, and furnished to the substantial sum of £56 19s. 11d. That bill of costs went before the Taxing Master, and the question arises as to items 2, 3, 4, 5, 6, 7, and 11. Item No. 2 is, "Perusing the following deeds and documents preparatory to drawing abstract—viz.: Marriage settlement, dated 7th August, 1834, Rev. Richard Olpherts with Miss Mary Richardson; 195 folios, at 1s. per folio, £9 15s." From that charge the Taxing Master has taxed off £9 2s. 6d., allowing 12s. 6d. for the item. The next item, No. 3, is, "Perusing mortgage for £3,000, dated 24th October, 1844; 200 folios, £10," off which £9 7s. 6d. has been taxed, allowing the same sum, 12s. 6d., as on item No. 2. Thus the charge for perusing these two deeds amounts to £19 15s., a very substantial sum. If that charge be valid and legal it discloses a very unsatisfactory state of the law, and it is more than questionable whether it ought to be permitted to remain so. For a fee of two or three guineas the services of a competent barrister would be obtained, not for perusing the two deeds only, but for advising on their construction, and, I incline to think, also drafting a further deed if necessary.

The charges are claimed under the General Order, made in pursuance of the Solicitors' Remuneration Act, 1881. The 2nd schedule to that order is headed, "Instructions for drawing and perusing deeds, wills, and other documents, in which, in ordinary cases as to drawing, &c., the allowance shall be, for perusing, 1s.

per folio." The contention on the part of the solicitor for the vendor, the tenant for life, is that the 2nd schedule includes the reading of all deeds, no matter how numerous, relating to the matter in hand. The contention on the other side is that the 2nd schedule does not apply to the mere perusal of an old deed, but simply to the case of perusing and approving a new deed or draft-deed, the perusal of which requires professional skill or advice, and that it was for that remuneration was given by Schedule II. Mr. Matheson, on behalf of the Coleraine Harbour Commissioners, relied on two other answers to the motion to review the taxation. He said, first, this comes within the 2nd paragraph of the rule; that it is business "in an action, or transacted in a Court or in the Chambers of the Judge or Master," and therefore it is excepted from the operation of the rule. In my opinion, that answer is not well founded. This is not business in an action, or transacted in any Court, or in the Chambers of any Judge or Master. It was transacted out of Court, done in consequence of the Coleraine Harbour Commissioners having called for an abstract of title without any order of the Court. Therefore, in my opinion, that is not a sufficient answer to this motion. Mr. Matheson also relied on another ground—viz., the 11th rule attached to the 1st schedule to the General Order, which is this: "In cases of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendors' charges are paid by the purchaser, the scale shall not apply." The scale to which that rule applies is the scale contained in Schedule I. of the General Order, which gives an *ad valorem* remuneration to the vendor's solicitors and the purchaser's, and a mortgagor's and mortgagee's solicitors for all charges connected with the negotiation for the sale or purchase of property, or for charges connected with the loan, deducting title, searches, &c. The remuneration and payment of it is proportioned to the amount of purchase money on a completed transaction. This was not a sale; it was merely the case of an abstract of title, and the remuneration could not be ascertained by an *ad valorem* amount proportioned to the purchase money or consideration, since it was not a completed transaction, and further proceedings must hereafter be had dealing with the *corpus* of the funds. Therefore the case does not fall within the exception.

Rolls.
1886.

The main question is whether, in any sense, the charge for perusing these deeds comes within the charge of 1s. per folio for perusing in the 2nd schedule? The General Order, section 2, provides:—(c) In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore, or in Schedule I., hereto prescribed, but which is not, in fact, completed, and in respect of other deeds and documents, including settlements, and of all other business, the remuneration for which is not hereinbefore, or in Schedule I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto.

Then, as regards this case, is the system altered by Schedule II.? It is headed, “Instructions for drawing and perusing deeds, wills, and other documents;” and it provides, first, “such fees for instructions as, having regard to the case and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case may be fair and reasonable.” That is a direction to the Taxing Master to allow fair and reasonable charges. Secondly, “In ordinary cases as to drawing, &c., the allowance shall be, for drawing, 2s. per folio; where draft exceeds 100 folios, 1s. per folio to be allowed for the excess. For engrossing, 8d.; for fair copying, 4d.; for perusing, 1s.; where documents exceed 100 folios, 5d. per folio to be allowed for the excess.”

Now, in my opinion, the context plainly shows that in that schedule “the drawing and perusing” were intended to apply to the same document, and that the fee of 1s. for perusing deeds does not apply at all to any other conveyancing matter, the remuneration for which was to be regulated according to the present system.

But it is said that if that be so, there is no provision made for the preparation of abstracts of title, where the sale or loan is completed. That is provided for by the scale in Schedule I., Part I., and Schedule II. provides for abstracts of title where the abstracts of title are not covered by the above scale.

Therefore these numerous charges for perusing deeds, which are in amount startling, are, in my opinion, not legal; and items from No. 2 to No. 7, inclusive, were rightly disallowed by the Taxing Master.

The item No. 11 is—attending Thomas Greer Carson, Esquire,

Commissioners' solicitor therewith, 10s.; the Taxing Master has struck off 3s. 4d. No argument was addressed to me upon that except by Mr. Shekleton. I find that sum allowed in ordinary cases by Schedule II. I do not see why the 3s. 4d. was struck off. I will allow that item to stand as it was.

Rolls.
1886.

The costs of this application must be paid by Mr. Olpherts.

Solicitors for petitioners: *Messrs. Cruikshank & Leech.*

Solicitors for the Harbour Commissioners: *Mr. T. G. Carson.*

THE QUEEN v. NESBITT.

(*By permission, from 20 Ir. L. T. R. 56.*)

Armagh
Assizes,
1886.

July.

Manslaughter—Medical Witnesses—Allowance for attendance at Assizes.

Fee of £3 3s. a day and expenses, notwithstanding Treasury scale only sanctioning £2 2s. per day, allowed to medical witness when not residing in the Assize town.

IN this case two medical gentlemen—Dr. Palmer, of Armagh, and Dr. Allen, of Keady, Armagh—had been examined for the Crown, before the Grand Jury, and at the trial, and on application to the Crown Solicitor, were informed that they could only receive a fee of £2 2s. a day each and their expenses, which was the maximum laid down by the Treasury scale of allowances in such cases.

Smith, on behalf of the medical witnesses in this and other cases tried at same Assizes, applied for an order for payment of a fee of at least £3 3s. each to the gentlemen who had attended for the Crown at the Assizes. Many of them had to come a considerable distance, and make provision for the discharge of their duty in their absence, and they considered that the fee offered by the Crown Solicitor was wholly inadequate.

O'BRIEN, J.:—

I have no hesitation in cases of manslaughter, murder, or serious wounding, where the Crown properly require medical testimony, and in all the class of cases in which I am empowered to do so by statute,

*Armagh
Assizes.
1886.*

in making an order that any medical gentleman examined, or in attendance to be examined, on the part of the Crown, who does not reside in the Assize town, should receive a fee of £3 3s., and the authorised expenses. Of course the effect will be that the county will have to pay the extra guinea; but, in my opinion, even £3 3s. a day for the eminent medical gentlemen whom I see attending at the different Assize towns, at very great personal inconvenience, is far from being liberal payment.

Solicitor for applicants: *Joshua E. Peel.*

*Appeal.
1886.*

Dec. 16.

In re O'CALLAGHAN, a Bankrupt.

(*By permission, from 19 L. R. Ir. 32.*)

Before LORD ASHBOURNE, C., and FITZGIBBON and BARRY, L.JJ.

Arranging Debtor—Arrangement turned into Bankruptcy—Accountant and Solicitor employed in arrangement by Resolution of Creditors—Costs—Taxation—Schedule to General Orders of 1872—Practice.

A trader presented a petition of arrangement, and obtained the usual protection order. At the first private sitting of creditors, it was resolved that a certain firm of accountants should investigate the petitioner's affairs. The accountants accordingly received certain sums out of the estate, and paid thereout certain sums to the petitioner's solicitor, on account of costs, and retained certain sums for their own charges. The arrangement was subsequently turned into bankruptcy, and the accountants paid to the assignees the balance remaining, after deducting the sums paid and retained by them as above mentioned.

Upon the application of the assignees, Miller, J., ordered the accountants to bring in the balance of the moneys received by them without any deductions, giving them liberty, within a month, to submit their bills of charges to the Registrar, to inquire whether any charges or costs had been properly incurred, either by them, as accountants, or by the solicitor, in relation to and *for the benefit of the estate of the bankrupt*, and that the assignees should, out of the funds in Court, pay the accountant and solicitor the sums so ascertained to be properly and justly payable to them.

On appeal, the majority of the Court of Appeal (Lord Ashbourne, C., and FitzGibbon, L.J.; Barry, L.J., *dissentiente*) varied the order below by directing the Registrar of the Bankruptcy Court to inquire whether any charges or costs had been properly incurred, either by them, as accountants, or by the solicitor, in relation to the estate of the bankrupt,

or the arrangement with his creditors proposed by him, and to tax said bills of costs and charges as if the arrangement had been carried out, but according to the scale of costs and charges under the General Orders of 20th December, 1872, and that the accountants should have credit for the amounts so ascertained to be properly payable in respect of the costs and charges aforesaid, and should lodge the balance in Court.

Per Barry, L.J., the accountants were entitled to be paid as on a *quantum meruit*, and the scale in Schedule to the General Orders did not apply.

Appeal.
1886.

In this case Messrs. Craig, Gardner & Co. appealed from an order of Judge Miller of the 23rd November, 1886, and sought to have it declared that they were entitled to retain the sum of £102 10s. 8d., balance of a sum of £150 in the order mentioned, and that the motion of the assignees upon which the order was made should be refused with costs.

John O'Callaghan, the bankrupt in this matter, had carried on the trade of a wholesale grocer in the town of Tralee. On the 8th January, 1884, he presented a petition for arrangement with his creditors under sect. 343 of the Irish Bankrupt and Insolvent Act, 1857 (1), and obtained, under that section, an order for the protection of his person and property from process. On the 16th January, 1884, the first private sitting was held, and a resolution was passed that the matter should stand adjourned, and that Messrs. Craig, Gardner & Co. should investigate the position of the petitioner's estate. The adjourned meeting was held on the 28th January, 1884, and the petitioner's offer not being accepted, it was arranged between the petitioner and the creditors that Messrs. Craig, Gardner & Co. should remain in charge of the estate. The following sums were received by them from the estate:—On the 19th January, £80; on the 22nd January, £44; on the 5th February, £23; and on the 20th February, £3, making together the sum of £150. Messrs. Craig & Gardner paid to Mr. Davoren, the petitioner's solicitor, on account of his costs, the sum of £25 on the 30th January, and the sum of £20 on the 15th February, and retained for themselves the sum of £57 10s. as and for their own charges. The petitioner having died, the matter was turned into bankruptcy on the 19th February, 1884.

On the 1st March, 1884, the official assignees applied to Messrs.

Appeal.
1886.

Craig, Gardner & Co. for an account of the moneys received by them; and on the 4th March, 1884, Messrs. Craig, Gardner & Co. wrote, stating the sums received by them and the disbursements, as above stated, and enclosing a cheque for the balance remaining in their hands, £47 9s. 4d.

On the 7th May, 1886, a ruling was made that Messrs. Craig, Gardner & Co. should file a verified account, and on the 25th May, 1886, they filed an affidavit, giving the same account as before, and giving particulars of their own charges, in which they charged £3 3s. a day for their own and £1 1s. for their assistant's services, and £16 11s. 8d. for travelling and hotel expenses. The matter having come on before the Chief Registrar of the Bankruptcy Court, Mr. Davoren, on behalf of Messrs. Craig, Gardner & Co., contended that they were not bound to render any further account or to have their charges taxed, and he himself declined to furnish the particulars of his costs, unless a ruling was made that any excess appearing due to him, over and above the sums paid to him, should be paid. On the 26th October, 1886, a notice of motion on behalf of the assignees was served on Messrs. Craig, Gardner & Co., that at the adjourned sitting, which would be held before the Court on the 29th October for the audit of the account of the official assignee in this matter, an application would be made for an order that Messrs. Craig, Gardner & Co. should forthwith lodge with the official assignee in the matter the sum of £102 10s. 8d., balance of the sum of £150 received by them, and for the costs of the application; and that motion coming on for hearing before Judge Miller he, on the 23rd November, 1886, made the following order, viz. :—

That Messrs. Craig, Gardner & Co. should, within one week from the date of the said order, lodge with Lucius H. Deering, official assignee, £102 10s. 8d., balance of the sum of £150 cash belonging to the estate, received by them between the 19th January and 20th February, 1884, both inclusive, and that they should pay the costs of the application; and it was further ordered that Messrs. Craig, Gardner & Co. and Mr. Richard Davoren, solicitor, should be at liberty, within one month from the date of the order, to submit their bills of charges to the Chief Registrar, notwithstanding any irregularity, to inquire whether any charges or costs had been

properly incurred either by Messrs. Craig, Gardner & Co., as accountants, or Mr. Richard Davoren, solicitor, in relation to and for the benefit of the estate of the bankrupt, and to tax and moderate the said bills of costs and charges, making all just and fair allowances, and to ascertain the amounts properly and justly payable in respect thereof; and that the assignees should be at liberty, out of the funds to the credit of the estate, to pay to Messrs. Craig, Gardner & Co. and Mr. Richard Davoren the sums which the Chief Registrar should so ascertain to be payable to them respectively.

From this order the present appeal was brought.

Mr. Madden, Q.C., and *Mr. C. O'Connor* for the appellants.

The order appealed from can only be supported on the ground that the adjudication has the effect of making the bankruptcy relate back to the presentation of the petition for arrangement. That it does not so relate back was decided in *The Merchant Banking Co. v. Spotten* (1).

The petition for arrangement was presented under sect. 343 of the Act of 1857 (2), and under section 344 of that Act an order could have been made, if a proper case was made for it, directing that the estate and effects of the petitioner should be taken possession of. No such order was made here, nor was the petitioner's estate vested in the assignees under section 349, the resolution in this case not requiring that it should be so vested. Judge Miller, therefore, had no jurisdiction to interfere with the arranging debtor's dealings during the time he was endeavouring to arrange with his creditors, and during that time he had power to enter into contracts. General Order CXVIII., referred to by Judge Miller, does not apply, as the £102 10s. 8d., ordered to be brought into Court was not assets of the bankrupt at all, as it was expended before the bankruptcy.

Mr. Carton, Q.C., for the assignees:—

I do not contend that the bankruptcy relates back, but my submission is that, when an arranging debtor presents his petition and obtains a protection order, his property thereupon comes under the

(1) *Ir. R.* 11 Eq. 586.

(2) 20 & 21 Vict., c. 60.

Appeal.
1886.

control of the Court. Messrs. Craig, Gardner & Co. were not employed by the arranging debtor at all, but by a resolution in the arrangement matter. General Order CXVIII. expressly provides that all bills and charges of solicitors and accountants in matters of bankruptcy or arrangement shall be taxed by the Registrars according to the scale in the schedule, and that no payments in respect of such bills or charges shall be allowed without such taxation having been made.

The following order was made by the Court of Appeal:—

“ It is ordered that the said order of the Court of Bankruptcy, dated the 23rd day of November last, be varied, and that the same, as varied, do stand as follows, that is to say:—It is ordered that Messrs. Craig, Gardner & Co. and Mr. Richard Davoren, solicitor, do, within one month from the date of this order, submit their bills of the charges included in the account mentioned in the said order of the 23rd November last to the Chief Registrar of the Court of Bankruptcy, for taxation and review, with liberty to the said Chief Registrar, notwithstanding any irregularity, to inquire whether any charges or costs included therein have been properly charged or incurred, either by Messrs. Craig, Gardner & Co., as accountants, or by Mr. Davoren, as solicitor, in relation to the estate of the bankrupt, or the arrangement with his creditors proposed by him, and to tax and moderate the said bills of costs and charges (making all just and fair allowances), as if the said arrangement had been carried out, but according to the scale of costs and charges under the General Orders of the Court, dated 20th December, 1872, so far as the same may be applicable thereto, and to ascertain the amount properly and justly payable in respect thereof; and it is ordered that Messrs. Craig, Gardner & Co. do have credit, out of the sum of £102 10s. 8d. in the said order of the 23rd November last mentioned, for the amount which the Chief Registrar shall so ascertain to be properly and justly payable in respect of the costs and charges aforesaid; and it is further ordered that Messrs. Craig, Gardner & Co. do, within one week after such amount shall be so ascertained, lodge with Lucius Henry Deering, Official Assignee, the balance, if any, of the said sum of £102 10s. 8d. to the credit of the estate in this matter; and it is ordered that

Messrs. Craig, Gardner & Co. do abide their own costs of the motion of the 23rd November last, and that the assignees do pay to the said Messrs. Craig, Gardner & Co. their costs of this appeal when taxed, and that the said assignees do have the same, together with their own costs of the motion of the 23rd November last, and of this appeal, when taxed, out of the estate in this matter."

Appeal.
1886.

BARRY, L. J., dissented, stating that, in his opinion, the scale in the schedule to the General Orders did not apply, and that Messrs. Craig, Gardner & Co. were entitled to be paid as on a *quantum meruit*.

Solicitor for the appellants: *Mr. Davoren.*

Solicitors for the respondents: *Messrs. Casey & Clay.*

In re DEAN; WARD *v.* HOLMES.

(1883. D. 275.)

Kay, J.
1886.

March 24.

(*By permission*, from 32 Ch. D. 209; s. c. 55 L. J. Ch. 420.)

Practice—Costs—Attempted ineffectual Sale by Trustees—Change of Trustees and of Solicitors—Taxation of Costs of Old Trustees—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order, r. 2 (c); Sched. I., Pt. I., r. 2.

Schedule I., Part I., Rule 2 of the General Order to the Solicitors' Remuneration Act, 1881, applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors.

If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under General Order, Rule 2 (c).

ADJOURNED SUMMONS.—Certain property forming part of the estate of the testator, John Dean, was put up for sale by public auction by the then trustees of his will, who employed a firm of solicitors for the purpose.

The property was offered for sale in twenty-six lots, but only two of such lots were sold.

Kay, J.
1886.

This action was shortly afterwards instituted for the administration of the estate; and in the course of the proceedings the old trustees retired and new trustees were appointed in their place, who employed another firm of solicitors to act in the trust. The order appointing the new trustees directed the taxation and allowance of the costs, charges, and expenses of the old trustees, and under it the old trustees carried in, amongst other costs, those of the sale by auction. The Taxing Master, however, only allowed them the percentage remuneration upon the two lots which were actually sold, and disallowed the costs and the disbursements connected with the attempted sale of the remaining lots. The old trustees objected to the taxation, but the Taxing Master refused to allow their objections, and gave the following answer:—"There is provision in the Solicitors' Remuneration Act, 1881, for the allowance of scale charges when property is not sold at the auction, but sold subsequently. To allow the item objected to according to Schedule II. might give the solicitor twice or thrice the amount he would be entitled to under the scale if the property had been sold. It could not have been intended to give more for doing half the work than the amount would have been if the business had been completed. The solicitor will receive at a subsequent period the scale charge when the property is disposed of, and, in addition, the charges provided for by Rule 2." The old trustees accordingly took out a summons to review the taxation, and that summons was adjourned into Court.

The material clauses of the General Order under the Solicitors' Remuneration, Act, 1881, are as follows:—

General Order, Rule 2 (c) :—"In respect of business not hereinbefore provided for connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases, or licences or agreements therefor, reconveyances, transfers of mortgage, or further charges not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore or in Schedule I. hereto

prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto."

Kay, J.
1886.

Schedule I., Part I., Rule 2 :—" The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is brought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted he is to charge according to the present system as altered by Schedule II. hereto. In case of a subsequent effectual sale by auction the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this rule as to commission on sales or attempted sales by auction are to be subject to Rule 2."

Hastings, Q.C., and Dunning, in support of the summons :—

Schedule I., Part I., r. 2, of the General Order under the Solicitors' Remuneration Act, 1881, only applies to a case where an attempted ineffectual sale and a subsequent effectual sale are conducted by the same solicitor. But this case falls within the General Orders, Rule 2 (c), relating to business not thereinbefore provided for connected with an incompleated transaction, and the Taxing Master ought to have dealt with it accordingly, and to have allowed the costs of the ineffectual sale thereunder.

Goldney-Cary, for the plaintiffs, *contra*.

KAY, J. :—

As I understand Rule 2 of Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, the effect of it is this—If an attempted sale by auction fails, and the same solicitor afterwards carries out the sale either by negotiation or public auction, he is to get, not what he would have got if he had

Kay, J.
1886.

carried out the sale in the first instance, but that and something more for the abortive sale. That obviously can only apply where the same solicitor acts in both sales; but that is not the case here, as the new trustees decline to employ the same solicitors as their predecessors. The case, therefore, really comes to this. If the same solicitors were going to sell the property, whether by negotiation or public auction, they would get something for the abortive sale as well as for the actual value, rather more than they would have got if they had simply sold property at the first sale. But if different solicitors act for the new trustees, and the subsequent sale cannot be carried out by the same solicitors as acted on the first occasion, the new solicitors will not get anything for the costs of the abortive sale. How, then, must the costs of the abortive sale be dealt with? I think they must be dealt with under General Order, Rule 2 (c). The Taxing Master in this case must tax these costs in some way or other upon that footing, and I send the matter back to him for that purpose. The costs of this application must be included in those costs.

Solicitors: *Bell, Brodrick, & Gray; Pitman & Sons.*

C. A.
1886.

In re EMANUEL AND SIMMONDS.

(*By permission*, from 33 Ch. D. 40; s. c. 34 W. R. 613, 55 L. T. 79, 55 L. J. Ch. 710.)

Pearson, J.
April 16, 17.

C. A.
May 26.

Solicitor and Client—Costs—Taxation—Costs of Preparation of Lease and Agreement for Lease—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), ss. 2, 4—General Order under Solicitors' Remuneration Act, 1881, r. 2; Schedule I., Part II.

The scale fee prescribed by part II. of Schedule I. to the General Order of August, 1882, under the *Solicitors' Remuneration Act*, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease, and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot charge for the preparation of the agreement in addition to the scale fee.

Decision of Pearson, J., affirmed.

An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property and deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be of the essence of the contract, and that, on

the lessor complying with these conditions, the lessor should grant and the lessee accept a lease in the form thereto annexed.

Appeal.
1886.

Held, that these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but relating to the terms on which the lease was to be granted, and that the preparation of the agreement was "business connected with" the lease within the meaning of Rule 2 of the General Order, and could not be separately charged for.

"Agreements for leases" in Schedule I., Part II., mean agreements for leases intended to be relied on as regulating the tenancy without any formal lease, and the scale fee is payable in respect of them.

SUMMONS to review a taxation of costs.

On the 10th of January, 1885, Messrs. Emanuel and Simmonds, Solicitors, acting on behalf of Mr. A. H. Beddington, prepared an agreement for a lease to be granted by him of some premises in Lime-street, in the city of London, to Messrs. Benecke and Horsfall. By clause 1 the lessor agreed to grant to the lessees a lease of the premises for twenty-one years from the 25th of March, 1885, determinable on certain conditions at the option of the lessees at the end of the first seven or fourteen years, at the yearly rent of £1,150, "such lease to contain the covenants, clauses, provisoes, and agreements contained in, and to be in the same form as, the the form of lease hereunto annexed and signed by the parties hereto." Clause 2 provided that the lessees should, on the lessor duly fulfilling and performing the several stipulations mentioned in clause 3 of the agreement, accept such lease, and duly execute and deliver to the lessor a counterpart thereof, and that such lease and counterpart should be prepared by the solicitors of the lessor, and the lessees should pay the expenses of and incidental to the preparing and executing the agreement and the lease and counterpart, but that the obligations, covenants, and rent under such lease should commence on the lessees' part only from the date of the completion of the works in clause 3 of the agreement mentioned, and possession being given to the lessees complete in accordance with the said stipulation. By clause 3 the lessor agreed at his own expense to execute certain specified alterations in and repairs to the premises. And clause 4 provided that the lessor should deliver to the lessees possession of the premises so soon as the alterations and works should have been completed and not later than the 1st of March, 1885, and that in this respect time should be of the essence of the

Appeal.
1886.

agreement. The alterations and works stipulated for were duly executed, and the lessees took possession of the premises.

Messrs. Emanuel and Simmonds delivered their bill of costs for the preparation of the lease and counterpart to the lessees, their charges amounting to £53 8s. 2d. In this bill they charged for the lease and counterpart, £24 10s., that being the amount of the scale fee as prescribed by Part II. of Schedule I. to the General Order of August, 1882, under the Solicitors' Remuneration Act, 1881. They charged also £5 5s. for surveyor's expenses, and £6 10s. 6d. for stamp duty and petty disbursements, making a total of £36 5s. 6d. They charged also separately for the preparation of the agreement in detailed items, in accordance with the old system as altered by Schedule 2 to the General Orders. The lessees' solicitors objected that the scale fee for the lease and counterpart included the costs of and incidental to the preparation of the agreement, and they obtained an order for the taxation of the bill. The Taxing Master disallowed all the items relating to the preparation and execution of the agreement, and taxed the bill down to £36 10s. 6d., and in answer to objections carried in by Messrs. Emanuel and Simmonds said that he was of opinion that the preparation of the agreement could not properly, having regard to the General Order and the decisions of the Court thereon, especially *In re Field*, (1) be charged separately, and in addition the fee allowed to the solicitors by Part II. of Schedule I., must be included in that fee. He stated his opinion to be that sub-sects. 1 and 2 of sect. 8 of the Solicitors' Remuneration Act did not apply to the case, since that section applied only to agreements between the solicitor and his client, which the agreement of the 10th of January, 1885, was not.

Ante, p. 278.

Messrs. Emanuel and Simmonds took out this summons to review the taxation in accordance with their objections.

The summons came on to be heard before Mr. Justice Pearson, on the 16th of April, 1886.

D. L. Alexander, for the summons:—

A solicitor is entitled to be remunerated according to the old system as altered by Schedule 2 to the General Order under the

(1) 29 Ch. D. 608.

Solicitors' Remuneration Act, 1881, for all business the remuneration for which is not prescribed by Schedule I.

Appeal.
1886.

The preparation of an agreement for a lease is not included in Part II. when there is an agreement as well as a lease. The words at the heading are, "Leases or agreements for leases." *In re Field* (1), on which the Taxing Master relied, does not apply. ^{*Ante*, p. 278.} There was no agreement for a lease there. The Court of Appeal held that the negotiations for the lease were included in the scale fee, because the negotiations were, within the meaning of rule 2, "Business connected with the lease." That does not apply to an agreement for a lease, especially when, as in the present case, the agreement was more than a simple agreement for a lease. In *In re Field* it was argued that preliminary negotiations must be included in the scale fee in the case of a lease, because, in the case of a sale, Part I. of Schedule I. provides expressly that a fee shall be paid for the negotiation of the sale. But in Part I. the scale fee for the vendor's solicitor for deducing title and perusing and completing conveyance, expressly includes also "preparation of contract and other conditions of sale, if any," and the scale fee for the purchaser's solicitor for investigating title and completing conveyance expressly includes also "perusal and completion of contract, if any." This shows that, in the case of a lease, where there is also a preliminary agreement, the remuneration for the preparation of the agreement is not included in the scale fee. Part II. of Schedule I. applies to an agreement for a lease only where there is an agreement not followed by a lease. Where there is an agreement followed by a lease, the solicitor is entitled to charge for the agreement according to the old system as ordered by Schedule II.

Sterling, for the lessees, was not heard.

PEARSON, J.:—

The solicitors who prepared the lease in this case previously prepared an agreement for the lease, and, when the lease had been substituted for the agreement and the whole transaction was completed, they made out their bill of costs and charged the *ad valorem* fee for the preparation of the lease, and they also charged

Appeal.
1886.

Ante, p. 278.

separately for the preparation of the agreement. The Taxing Master has disallowed the charges for the agreement, being of opinion that it was paid for by the *ad valorem* fee for the lease, and that he was precluded by the decision of the Court of Appeal in *In re Field* (1) from coming to a contrary conclusion. In my opinion he was right, and I am equally bound by that decision. In that case there were some preliminary negotiations for a lease, and the solicitor made a charge for them in addition to the *ad valorem* fee for the lease. Mr. Justice Chitty disallowed the additional charge, and the Court of Appeal affirmed his decision. Lord Justice Cotton said, (2) "The question is whether negotiations preparatory to the granting of a lease are not business connected with a lease. In my opinion they are, and, if so, the charges in respect of them are covered by Part II. of Schedule I., whatever its precise terms may be." Lord Justice Lindley and Lord Justice Fry agreed in this view. I cannot see my way to hold that the agreement in the present case was anything but part of the business connected with the lease, and I am confirmed in this view by the heading of Part II. of Schedule I. to the Remuneration Order, "Scale of charges as to leases or agreements for leases." There is to be one *ad valorem* scale fee for a lease and everything connected with it, and for an agreement for a lease if no lease is granted. The summons will be dismissed with costs.

The solicitors appealed. The appeal was heard on the 26th of May, 1886.

A. Charles, Q.C., and *D.L. Alexander*, for the appeal:—

Schedule I., Part II. of the Rules made under the Solicitors' Remuneration Act (3) fixes a remuneration by scale "for preparing, settling, and completing lease and counterpart." We say that the preparation of the agreement is business coming under the description in Rule 2 (c) of "business the remuneration for which is not hereinbefore or in Schedule I., hereto prescribed." The agreement was an effective and material instrument; it provided for certain repairs and alterations being done within a certain time, and time was made of the essence of the contract. It was therefore, not a mere agreement for granting a lease containing certain stipu-

(1) 29 Ch. D. 608.

(2) 29 Ch. D. 615.

(3) 44 & 45 Vict. c. 44.

lated provisions. How is the remuneration provided for by Schedule I? Rule 2 (b) speaks of agreement of leases, and Schedule I., Part II., in its title mentions them, but as the remuneration is only given for the preparation of the lease and counterpart, "agreements for leases" must mean agreements under which tenants hold lands without formal leases being granted, the object of naming agreements for leases being that where it was not intended to have a lease the remuneration might not be left unprovided for. Some light is thrown on the question by Schedule I., Part I., which deals with remuneration in cases of sales, purchases, and mortgages. A scale fee is given to the vendor's solicitor for deducing the title to property and perusing and completing conveyance "(including preparation of contract or conditions of sale, if any):" and again, to the purchaser's solicitor for investigating title and preparing and completing conveyance "(including perusal and completion of contract, if any.)" So where the rules intended a contract to be included they said so. We say, then, that the preparation of this agreement is extra business for which the solicitors are entitled to be paid. *In re Field* (1) has been relied on against us, but in that case there was nothing but negotiations—no written agreement was entered into—they were merely heads of agreement which contained the result of the negotiations but did not make a contract. There was therefore no conveyancing business to be charged for besides the lease and counterpart. The decision from which we appeal goes much further than *In re Field* (1), which only decided that negotiations were included in the scale fee, whereas here a separate piece of conveyancing has been held to be included. Mr. Justice Pearson seems to have read *In re Field* (1) as deciding that all business connected with a lease comes within the scale fee, but the case does not decide that. Where would such a rule stop? Before a lease could be granted it might be necessary to obtain a surrender of a prior lease, the conveyancing work required for that would certainly be connected with granting the lease, but could it be contended that it was included in the scale fee? Suppose a lessee agrees for a further term to be granted at the expiration of his existing term which has ten years to run. The business would not be completed till then. Is it to be held that the preparation of the agreement

Ante, p. 278.

Ante, p. 278.

Ante, p. 278.

Appeal. 1886. is a thing which cannot be separately charged for, so that the solicitor cannot get any remuneration till the end of ten years?

Northmore Lawrence, contra:—

Rule 2 says that the remuneration of a solicitor “in respect of business connected with sales, purchases, leases, &c., and other matters of conveyancing” is to be regulated as follows. Therefore what we are dealing with is the remuneration of a solicitor in respect of business connected with a lease. Surely this is business connected with a lease.

[COTTON, L.J.:—The appellants say the agreement includes something to be done outside the lease.]

That something was part of the terms on which the lease was to be granted. The agreement settles the terms, and it cannot make any difference whether one of the terms was that a premium should be paid or that certain works should be done.

(He was then stopped by the Court.)

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice Pearson upon a summons to vary the Taxing Master’s certificate. The question turns on the true construction of the Solicitors’ Remuneration Act, 1881, and the General Orders under it. Mr. Beddington had a house and Mr. Benecke proposed to take it, but before he would take it he required certain repairs to be done. An arrangement was made what those repairs were to be, and then, Mr. Benecke not being content to take the house until they were done, an agreement was signed to which was annexed the form of the intended lease, and that agreement provided that certain repairs should be done within a limited time, and upon those being done the possession should be given to the intended lessee, and that the lessor should grant and the intending lessee should accept the lease. In the bill of costs an *ad valorem* charge was made for the lease and counter-part according to the scale, and a separate set of charges according to the old system as altered by Schedule II., for the matters considered to be connected with this agreement and with the repairs to be done. The Taxing Master said that the whole of this must be covered by the *ad valorem* payment. I think he was right. We

have previously had the point before us to some extent in the case of *In re Field* (1), and what we decided was, that, having regard *Appeal*
1886.
Ante, p. 278. to Rule 2, the remuneration for the negotiations for the lease must be held to be included in the payment to be made on the *ad valorem* scale for the lease. Of course that could only apply where the transaction was the completed transaction. But it is said that in that case there was no agreement beforehand, whereas here there is a separate independent agreement which ought to be paid for separately, as being business not otherwise provided for. That was supported on this ground, that Part II. of Schedule I., which relates to leases or agreements for leases, only refers to one payment being made for a lease—or that which is equivalent to a lease, an agreement for a lease intended to operate as a lease—and therefore this is to be dealt with as something not specially provided for. I agree as to Part II., that “lease” means an actual lease, a proper lease, and that “agreements for leases” means agreements on which the parties intend to rely as sufficient for the purpose of stating the terms on which the property was held without having formal leases executed. But that does not settle the question, because Rule 2 says this: “The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action . . . is to be regulated as follows.” It is true the subsequent directions in (b) and the directions in Part II. of Schedule I., merely give in terms their remuneration for the lease and counterpart, but in my opinion, as was pointed out in the case of *In re Field* (1), although the remuneration is simply with reference to the rent, or, if there is a premium paid to the lessor for the lease, then with reference also to the premium, yet the remuneration for all business connected with the lease is to be included in the *ad valorem* remuneration. That was considered to be a fair way of settling the remuneration of a solicitor so as to prevent discussion and questions and a detailed bill of charges as regards particular items of business done. To my mind the only question we have here is this, whether in this particular case it can be said that this agreement, or anything in it, is anything but business connected with the lease; that is to say, a stage in the *Ante*, p. 278.

(1) 29 Ch. D. 608.

Appeal.
1886.

negotiations leading to the granting of the lease. I can quite understand that where a lease is granted there may be an agreement which, although it refers to the lease, is to be considered as a collateral matter, as a matter not amounting merely to a step in the negotiations for a lease, or providing for a step in the negotiations for a lease, but providing for something different. In the present case there was a negotiation for a lease. The lessee said: "I will give for that house a certain rent if you put it into a certain state of repair." It was thought desirable when that was agreed to fix the parties by putting it into writing, and, though clause 3 at first sight looks rather like a collateral agreement, something outside the lease, the agreement, in my opinion, amounted to nothing more than putting down on paper the terms which during the negotiation for the lease had been agreed to as the terms on which the lease should be granted and taken. It must depend on the circumstances of each case whether an agreement is collateral or not. In the present case the agreement, in my judgment, is merely part of the negotiation for the lease which was afterwards granted, and, the transaction being complete, one charge must, in my opinion, cover all charges with reference to this agreement, as well as everything else connected with the granting of the lease or the negotiations for the lease. In my opinion, therefore, this appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. I think there is a little obscurity about these rules and schedules. But when we come to understand this particular case the difficulties do not, by any means, appear insuperable. The business the solicitor here had to transact appears to me to be one transaction, the preparation of an agreement and a lease, not two separate pieces of business. By the second of the rules under the Solicitors' Remuneration Act, 1881, it is provided that the remuneration of a solicitor in respect of business connected with leases shall be regulated as thereafter mentioned. Then (b) provides for what his remuneration is to be in respect of leases and agreements for leases of the kinds mentioned in Part II. of Schedule I., when the transactions shall have been completed. Then (c), so far as is material for this purpose, relates to other

business the remuneration for which is not thereinbefore, or in Schedule I. provided for. As I read those three clauses, this case is not within (c), but within (b), which directs us to look at Schedule I., Part II., for the scale of remuneration. We find there a scale of remuneration calculated on a certain percentage of the rental. The controversy is whether the solicitor who is to be paid that *ad valorem* remuneration can charge for the preparation of the agreement for the lease as other business. I think he cannot. Mr. Charles tried to put it on clause (c). I do not think it comes within clause (c), for it is thereinbefore provided for—that is, by clause (b). I agree with the other members of the Court in thinking that agreements for leases are mentioned in the heading to Schedule I., Part II., to meet the case where a man goes into possession under an agreement for a lease without intending to take a lease at all. In such a case the agreement is to be paid for as if it were a lease. I cannot gather from this language that there is to be a double payment where there are both an agreement for a lease and a lease, which together form in reality only one piece of business.

As regards clause 3 of the agreement, as to repairs to be done by the landlord, which was much relied upon, I cannot regard it as anything more than a term of an agreement for a lease. It does not prevent the whole document from being an agreement for a lease and nothing else. Mr. Alexander relies on the introduction into Schedule I., Part I., which relates to sales and purchases, of an express reference to a contract for sale: “Vendor’s solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any).” No doubt the argument drawn from this, that where it was intended that a contract should be included, that intention was expressed, is legitimate; but I do not think it sufficient to turn the scale, the language relating to leases being, to my mind, sufficiently clear. Although this case is not precisely covered by *In re Field* (1), it is within the principle upon *Ante*, p. 278. which the Court acted in deciding that case, and I think that the appeal must be dismissed:

Appeal.
1886.

BOWEN, L.J.:—

I am of the same opinion. It seems to me that this charge with respect to which we are about to pronounce our judgment is for business which is done by the solicitor in respect of the lease. I think that, in considering the merits of this question and the principle of law we have to decide, we may put aside the alternative or disjunctive clause "or agreements for leases" in Part II. of Schedule I. I will assume that this expression is intended to include and cover, so that it shall not escape from the operation of the schedule, that special kind of document under which the tenant obtains possession of the land without a document amounting, in the eye of the law, to a formal demise. The real question here is, whether the business which has been separately charged for is business done in respect of the lease which was ultimately granted? It seems to me that this depends upon the question, whether the transaction is single or double, whether a document has been executed with the view of embodying stipulations which are more than part of the agreement for a lease, and something collateral to it and outside it, or whether the intermediate document, although it may have contained stipulations which will not ultimately find their way into the lease, nevertheless contains only such stipulations as are incidental to the negotiations for the lease. It is obvious that in each case this question must be decided on a view of the whole transaction, because a document, though it may be under one seal and contained in one piece of paper, may really contain various separate and independent contracts. It does not follow necessarily, as a matter of law or as a matter of business, that a document which is called an agreement for a lease may not contain stipulations with regard to subject matters so separate and so distinct as that those stipulations form no part of the agreement for the lease, but involve transactions outside. Looking at the matter from that point of view, the difficulty suggested by the appellant's counsel as to the cases of reversionary leases and surrenders ceases to present a difficulty. It may well be that business done with regard to an agreement for a reversionary lease is a separate business totally distinct from the reversionary lease itself, and may be separate from it for the purpose of discussing the remuneration of the solicitor. The same observation applies to the

case of a surrender. But it by no means follows that no collateral stipulations are part of the business which culminates in a lease. We know that in every negotiation for a lease the parties approach each other by steps, at each stage in the discussion oral terms are arrived at which bring the parties nearer to the final bargain. These terms must be considered part of the negotiations for the lease, and if they are reduced to writing they do not thereby cease to be part of the negotiations. When we look at this particular agreement I think that the clauses on which the appellants rely are only part of the terms on which the lease was to be granted, that the embodying those terms in this document was simply for the purpose of the lease, and that a preparation of the agreement was business done in respect of the lease.

Appeal.
1886.

Solicitors: *Emanuel & Simmonds ; Druces & Attlee.*

M'NAMARA v. MALONE.

Ex. Div.
1886.

(*By permission*, from 18 L. R. Ir. 269; s. c. 20 Ir. L. T. R. 24.)

May 13.

Costs—Taxation—Solicitor and Client—Solicitor attending Trial in County in which he does not Practise—General Orders, 1854, Schedule items 100, 101—General Orders, 1882, Schedule item 29—Ejectment—Case sent to Counsel for advice on Settlement of Writ.

A solicitor attending on a record for trial at assizes in a county where he does not usually practice is entitled, upon taxation between solicitor and client, to £2 2s. for each day necessarily occupied, irrespectively of the number of days the case may be actually at hearing, or of its being settled without a trial. The allowances Nos. 100 and 101 in the schedule to the General Rules of 1854, as between solicitor and client, are not altered by the Orders as to costs under the Judicature Act.

A fee to counsel for advising as to whether an ejectment will lie, and who are the necessary parties to be made plaintiffs, may, in a proper case, be allowed, as between solicitor and client.

SUMMONS on behalf of Charles L. Perrott, the plaintiff's solicitor, for an order that the Taxing Officer, Master Coffey, be directed to review his taxation of the costs of the said Charles L. Perrott in this action, as between solicitor and client. The summons had

Exchequer.
1886.

been originally heard before Andrews, J., in Chamber, and was directed by him to be moved in Court.

The action was brought to recover possession of premises in the town of Galway at the termination of a lease. The plaintiffs claimed under a derivative title from the original lessors. The defendants pleaded the statutable defence of possession, and also counterclaimed in respect of an alleged contract to grant a renewal. After notice of trial served, and the case being in the list of records for trial at the Galway Summer Assizes, 1885, a compromise was made whereby a new lease of the premises was granted at a considerable increase of rent, and each party to abide their own costs. The consent embodying this compromise was made a rule of *nisi prius* on the last day of the assizes.

The items mentioned in the summons, and which the Taxing Officer disallowed, were:—

	£	s.	d.
No. 13—Attending counsel with writ to settle			
same - - - - -	0	6	8
No. 14—Paid him fee - - -	1	1	0
(Nos. 15 and 16 were charges for copies of the original lease and other documents furnished to counsel, with instructions to prepare writ.)			
No. 123—Attending at Galway Assizes, absent from Dublin five days - - -	10	10	0

As to items Nos. 13–16, it appeared that a case had been sent to counsel, with the documents to advise as to parties, and to settle the writ.

It was admitted that the solicitor was necessarily absent from Dublin for the five days charged in No. 123, but the Taxing Officer was of opinion that, under the Rules of the 1st June, 1882, a fee of £5 5s. only could be allowed, in respect of the day on which the cause was made a rule of Court.

W. Green, in support of the application:—

As to the fee for settling the writ, Rule 190 of the General Orders, 1854, expressly provides that a fee may be allowed to counsel upon a case to advise as to parties or otherwise previously to the institu-

tion of any action of ejectment. This, as well as other Rules of 1854, not inconsistent with the Orders under the Judicature Act, remain still in force. Gen. Ord. X., April, 1878, Rule 29, *Pringle v. Gloag* (1); see also Gen. Ord. X., April, 1878, Rule 12. The writ was a proceeding within this rule. There can be no doubt as to the reasonableness of the solicitor in taking advice before issuing the writ. If necessary parties were omitted as plaintiffs in the writ the error could only be set right at a subsequent stage by leave of the Court, and probably on payment of costs.

Eschequer.
1886.

[PALLES, C.B.—If the solicitor had commenced such an action without taking counsel's opinion, and the case broke down, he might be liable to his client for negligence.]

Then as to No. 123, we again rely on the Rules of 1854. In the schedule to the General Orders of 1854, made under the Common Law Procedure Act, 1853, attendances at assizes are provided for in items 98–101. By 98 and 99 the attorney, whether practising in the assize county or not, was allowed, in party and party costs, an assize fee of £5 5s. and £2 2s. for each day of trial after the first.

Item 100 is as follows:—"As between attorney and client, if the attorney employed at the time be not a practitioner of the county, the client will be liable to pay him, in lieu of the assizes fee, for each day necessarily occupied, £2 2s." 101, "Also his actual travelling and other expenses, or in lieu of them *per diem*, £1 1s.": Bewley and Naish, C. L. P. Acts, App. p. lv. In the schedule to Gen. Ord. VII., April, 1878, provision was made for attendances at Assizes: items 171–176, Dillon's Judicature Act, p. 361; Ledwich on Costs. But we submit that though these items supersede Nos. 98 and 99 in the Rules of 1854, they only govern party and party costs, and they do not impliedly repeal Nos. 100 and 101 in the schedule to the Rules of 1854; and items 174 and 175 of the schedule of 1878 appear to have been designed to extend to taxation between party and party, the fees which Nos. 100 and 101 of the schedule of 1854 allowed as between solicitor and client. The several items, 171–176, have been undoubtedly rescinded by the Rules of June, 1879; Eiffe's Judicature Act, pp. 716, 717;

Exchequer.
1886.

substituting the allowances in Rule 68—viz., £5 5s. for the first, and £2 2s. for every subsequent day of hearing, and this allowance was again rescinded, but in substance re-enacted, by the Rules of 1st June, 1882, which are at present in force. But none of these rules under the Judicature Act expressly refers to, or can be taken as impliedly repealing, the allowances 100 and 101 in the Rules of 1851, which are therefore saved by Gen. Ord. X., April, 1878, Rule 29. But if this be not so, then there is no provision made for the remuneration of a Dublin solicitor attending in a local venue for a greater number of days than the case is actually at nearing—a contingency which may occur in cases where the assizes are protracted—and then the case falls within Ord. X., Rule 28: “As to any work and labour properly performed, and not within the provisions of these orders, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.” The allowance of £2 2s. a day and travelling expenses was settled even before the Common Law Procedure Act: *Royal Irish Insurance Co. v. Staines* (1). If a Dublin solicitor is retained in a case tried at Assizes he must attend the trial, and if the Taxing Officer's view be right he can get no adequate remuneration from such attendance, except by special contract with his client.

[DOWSE, B.—It would come to this, that if the case were settled without a consent being made a rule of Court, the solicitor would be entitled to nothing at all.]

There was no opposition to the application. The summons had been personally served on the client.

PALLES, C.B.:—

There are practically but two items to be considered on this application. One is No. 14, the fee paid to counsel to settle the draft writ of summons, the allowance of which will carry with it the small items, 13, 15, 16; and the second is a fee of £10 10s. charged by Mr. Perrott for five days' attendance at the Galway Assizes. As to No. 14, the Taxing Officer was probably misled by the way in which this item was entered in the bill of costs—viz,

fee for settling the writ. In fact, it was a fee upon a case sent to counsel for his opinion as to whether the action would lie, and to advise who were the proper plaintiffs. Looking at the nature of this action—an ejectment for overholding brought on the determination of an old lease where there had been a complicated devolution of title—there can be no doubt that it was a proper case in which to take counsel's opinion before instituting the action, and without laying down any general rule applicable to other cases which may arise, we think that these items, Nos. 13-16, shall be allowed.

The more important item, however, is the solicitor's charge for attending at Assizes. If the Master's ruling is right, a solicitor might go down to Belfast, remain there for a fortnight, and if the case was then settled in a manner most advantageous for his client, without a jury being sworn, he would get nothing whatsoever for such attendance, and it would, in fact, follow that in the present case Mr. Perrott would not be entitled even to the £5 5*s.* allowed; for I do not think merely making the consent a rule of Court can be regarded as a hearing or trial within the rule of June, 1882. But rules of Court must receive a reasonable construction; and, giving the best consideration I can to the question, I am of opinion that item 100 in the schedule to the Rules of 1854 is not inconsistent with anything in the Rules now in force, and therefore is not repealed. I also think that the charge should be allowed under Rule 28 of Order X., April, 1878, as work and labour properly performed, and not within the provisions of the orders under the Judicature Act, and for which the remuneration which would previously have been allowed may now properly be charged.

DOWSE, B., and ANDREWS, J., concurred.

Solicitor for the applicant: *C. L. Perrott.*

Appeal.
1886.

In re ALLEN.

Nov. 16, 18, 22.

(By permission, from 34 Ch. D. 433; s. c. 35 W. R. 218, 56 L. T. 6, 56 L. J. Ch. 487.)

1887.
Jan. 12.

(Before KAY, J.)

Solicitor and Client—Lease—Costs—Taxation—Election—“Undertaking any Business”—“Client”—Solicitors Remuneration Act, 1881 (44 & 45 Vict., c. 44), s. 1, sub-s. 3—General Order under Solicitors Remuneration Act, 1881, rr. 2, 6, Sched. I., Part II.

The solicitors of the assigns of a lease of copyhold land wrote to P., the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On the 25th of July P.'s solicitors wrote to the solicitors of the applicants stating that P. had called on them with the letter, and that the matter therein referred to should have their attention, and asking for evidence of the title of the applicants. The evidence required was furnished. Some delay took place in consequence of the necessity of P. being admitted, and obtaining a license to demise. On the 16th of October P.'s solicitors were informed by the steward of the manor that P. could be admitted, and that license to demise would be given. On the 19th of October P.'s solicitors gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under the Solicitors Remuneration Act. In the books of the solicitors was an entry under that date “instructions for drawing new leases,” but there was no evidence as to the circumstances under which it was made. On the 21st of October P.'s solicitors sent to the applicant draft leases. The leases were granted, and the lessees, who were bound to pay the costs of the lessor's solicitors, insisted that the remuneration must be according to the scale in Schedule I. :—

Held, by the Court of Appeal (affirming the decision of Kay, J.), that the election on the 19th of October was too late, for that business had been undertaken on the 25th of July, and that the taxation must be according to the scale.

Held, by Kay, J., that where, under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under rule 6 need be given by the lessor's solicitor is the lessor himself, the assigns not being “clients” of the solicitor within section 1, sub-section 3, of the Solicitors Remuneration Act, 1881, so as to make any notice to them necessary.

On the 29th of January, 1823, J. F. Brown granted to Cullingham, a builder, a lease of a piece of copyhold land at Brentford, with ten houses upon it, for twenty-one years from Michaelmas, 1822, and covenanted for three successive renewals for twenty-one years, and a final renewal for fifteen years, making up ninety-nine years

in the whole. Provisions were made for granting separate leases of the different parts of the property if required. Brown covenanted to procure at his own expense the licenses from the lord of the manor, and to indemnify Cullingham from all copyhold rents, dues, and services. Every lease and counterpart was to be prepared by the solicitor of Brown, his heirs or assigns, but at the costs of the lessees.

Mr. Parr was the successor in title of the lessor. The lease had been twice renewed, and the leasehold interest in some of the houses had become vested in Mrs. Hepburn, in others in Mrs. Russell, and in the rest in Miss Martin.

On the 24th of July, 1885, the solicitors of these ladies wrote to Mr. Parr a letter shortly stating the title of the three ladies under an appointment by will to the houses, the existing lease of which (that for the third term of twenty-one years) would expire at Michaelmas, 1885, and saying: "It is proposed that on the expiration of the present lease there shall be three leases granted for the renewed term, one to each of the ladies in question of the houses appointed to her. We shall feel obliged if you will put us in communication with your solicitors, and will instruct them to prepare the leases accordingly, and we shall be glad to produce to them the marriage settlement of Mr. and Mrs. Martin and the probate of Mrs. Martin's will, by which the appointments in question were made."

On the 25th of July Messrs. Allen, Mr. Parr's solicitors, wrote to the lessees' solicitors: "Our client, Mr. E. Parr, has seen us with your letter of yesterday addressed to him, and the matters therein referred to shall have our attention. We may say that we think we should be furnished with sufficient extracts from or abstracts of the marriage settlement and probate referred to in your letter."

On the 11th of August the abstract required was sent to Messrs. Allen. On the 12th of September the lessees' solicitors wrote to Messrs. Allen, saying that they should be glad to receive draft leases. On the 21st Messrs. Allen wrote: "We are in communication with the steward of the Manor of Ealing as to the admission of our client to this property, and when this has been done we will send you the draft leases for perusal. In the meantime we propose

Appeal.
1886.

to attend at your office to-morrow afternoon about three o'clock to inspect the documents comprised in the abstract of title which you have supplied."

On the 2nd of October the lessees' solicitors wrote again to hasten the matter, and on the 9th Messrs. Allen wrote expressing regret at the delay and hoping to let them have the drafts in a few days. On the 16th of October the steward informed Messrs. Allen that Mr. Parr would be admitted, and that license to demise would be given. On the 20th of October Mr. Parr was admitted, and license to demise obtained. On the 21st of October the draft leases were sent.

In the meantime, on the 19th of October, Messrs. Allen had written to Mr. Parr the following letter:—

"In order to enable us to endeavour to obtain from the lessees the whole of the costs incurred on the renewals of the leases of Brentford property it is necessary for us to give to you the enclosed notice. You will of course see that the reason for giving it is to save you from as much of the costs incurred as possible."

The notice referred to was as follows:—

"We beg to give you notice that on the grant of the renewed leases of the premises at Brentford (describing them) it is our intention to charge our costs thereof and incidental thereto in accordance with Schedule II. to the General Orders made in pursuance of the Solicitors Remuneration Act, 1881."

In the diary kept at Messrs. Allen's office there was an entry under date of the 19th of October, 1885, "Parr's trusts. Instructions for, and drawing three new leases." There was no evidence as to what passed in July when Mr. Parr took the letter of the 24th of July to Messrs. Allen, nor as to the giving instructions on the 19th of October.

When the leases had been granted Messrs. Allen sent to the solicitors of the lessees three bills of costs, one in respect of each lease, each amounting to £16 9s., total £49 7s.; made out on the old system as modified by Schedule II. of the Rules to the Solicitors Remuneration Act. The lessees obtained an order to tax. The Taxing Master taxed off £11 15s. from the aggregate amount of the three bills. Objections to the taxation were carried in by the lessees, who insisted that the costs ought to be made out according

to the scale in Schedule I., Part II. The Taxing Master disallowed the objections, and gave his reasons as follows:—

Appell.
1886.

“On the taxation, after reading the evidence, including the correspondence, I came to the conclusion that the business of preparing the lease to be granted in pursuance of the lessor’s covenant was not undertaken until the lessor’s solicitor had satisfied himself that the person who applied to the lessor to grant the lease was a representative of the original lessee and so entitled to have a lease granted to her, and that the letter which the solicitors wrote to the lessor and which he in his affidavit states he received on the 19th of October, 1885, was an election by writing under their hand communicated to the client before undertaking the business of preparing and completing the lease in and about which the lessor states he employed him, and consequently that the solicitors are entitled to be paid for that business according to Schedule II. of the Order and not according to the scale of Schedule I. I was also of opinion that the investigation of the title of the person claiming the right to have the lease granted is not such business connected with the lease as was in the case of *In re Field* (1) and *In re Emanuel and Simmonds* (2), decided to be so connected with the lease as to be included in the fee allowed by the scale Schedule I., and that it is distinct from the preparing, settling, and completing the lease and counterpart. It might have resulted in a failure by the claimant to show a title, and such investigations might occur several times. The lease of the 29th of January, 1823, contains the agreement for a new lease, and fixes all the conditions on which it is to be granted; there could not therefore be, and in fact there were not either an agreement for or negotiations for the lease in the ordinary sense of negotiations for a lease. I have considered the objections, and am still of the same opinion, and I disallow them.”

Ante, p. 278.

Ante, p. 332.

The lessees applied to vary this certificate, and the application was heard by Mr. Justice Kay on the 16th and 18th of November, 1886.

Hallane, for the applicants:—

The question is whether the election under Rule 6 of the General Order to the Solicitors Remuneration Act, 1881, was made in time.

(1) 29 Ch. D. 608.

(2) 33 Ch. D. 40.

Appeal.
1886.

That rule says that: "In all cases to which the scales prescribed in Schedule I., hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II., hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order." Under that rule the election must be made "before undertaking any business." Therefore, in the present case, notice of election ought to have been given before any part of the business was undertaken. I say the "business" began and was "undertaken" on the 25th of July, 1885, and that therefore the election purporting to be made on the 19th of October was too late. "Before undertaking business" means before entering into a contract to do it.

[KAY, J.:—The words seem to mean, reading them in a common-sense view, "before beginning the work."]

I say the solicitors did begin the work when they wrote on the 25th of July.

Having regard to rule 2 (c) of the General Order the lump sum in the Scale in Schedule I., Part II., "for preparing, settling, and completing lease and counterpart" includes all the negotiations for the lease, *In re Field*, (1); *In re Emanuel and Simmonds* (2). The notice of election was in itself bad, as the letter accompanying it misstated its object.

Ante, p. 278.
Ante, p. 332.

Millar, Q.C. and Allen, for the solicitors:—

The real question is, what is the meaning of the expression "undertaking any business?" We submit it means "taking in hand any business." We did not "undertake" the business till we began to prepare the lease. A solicitor cannot be said to "undertake" business when he makes preliminary negotiations with a view to seeing whether he will elect under rule 6 or not. As soon as he elects he may be properly said then to "undertake" the work. *In re Field* and *In re Emanuel and Simmonds* were not cases under rule 6; the question there was whether a solicitor could, in addition to the charge for "preparing, settling, and completing lease and counterpart," make a charge for preliminary negotiations; and it

Ante, p. 278.
Ante, p. 332.

was held that a solicitor who took his stand on Schedule I., Part II., could not make the additional charges. But from the judgments in *In re Field* it is to be inferred that notice of election may be given after negotiations have commenced. *Appeal.*
1886.
Ante, p. 278.

The only definition of the "business" to be "undertaken" is that in Schedule I., Part II., namely, "preparing, settling, and completing lease and counterpart;" and we submit that if an election is made "before undertaking any business," as there defined, it is in time. The applicants being liable under the original lease to pay the costs of renewal it would seem that they fall within the definition of "client" in sect. 1, sub-sect. 3, of the Act; that is to say, they are "persons for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements." If that is so, it may be that the right of election under rule 6 still subsists as against the applicants.

They also cited *Fleming v. Hardcastle* (1).

Ante, p. 290.

Haldane, in reply:—

The rules in Schedule I., Part II., dealing with the extra work, indicate that any other charges that might arise incidental to "preparing, settling, and completing lease and counterpart" are already provided for by the General Order.

KAY, J. :—

1886, Nov. 22.

I delayed pronouncing judgment in this case to give myself an opportunity of considering the General Order under the Solicitors Remuneration Act, 1881.

A novel question has been raised, which is, shortly, at what time does the "undertaking any business" mentioned in rule 6 begin?

The Order provides (rule 2) that the remuneration of a solicitor "in respect of business connected with," amongst other things, "leases," is to be (rule 2 (b)), when the transaction is completed, "that prescribed in Part II. of Schedule I." Turning to that Schedule I find, under the head of "lessor's solicitor for preparing, settling, and completing lease and counterpart," a charge varying with the rent. It is obvious that this included everything which is called in rule 2 "business connected with" leases, and not merely

(1) 52 L. T. (N. S.) 851.

Appeal.
1886.

Ante, p. 278.

Ante, p. 332.

the preparation of the lease and counterpart; and it has been so decided in two recent cases in the Court of Appeal: *In re Field* (1) and *In re Emanuel and Simmonds* (2).

The particular rule on which the present question arises is rule 6, which provides that in cases to which Schedule I. applies a solicitor may, "before undertaking any business," by writing "communicated to the client," elect to take his remuneration according to the old system as altered by Schedule II.; "but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order." This is a completely one-sided provision. No option in the matter is given to the client. It is altogether in favour of the solicitor; and the condition that he shall elect before undertaking the business is most material, because, if he were at liberty to carry it on until he saw which was most to his benefit and then elect, the client might in every case be put at considerable disadvantage, and practically the scale would never be allowed to apply except where it was larger than the ordinary remuneration.

I am clearly of opinion that this was not intended; but that it is essential that the election should be made before the business which is covered by the scale-charge is undertaken; and the two decisions I have already referred to are important as showing what is the business covered by this scale. In the former of them, *In re Field* (3), it was decided that the costs in respect of the preliminary negotiations for the lease were so included. In the latter, *In re Emanuel and Simmonds* (4), the costs connected with the prior agreement—though it contained certain stipulations as to repairs to be done by the lessor before the lease—were also included.

Each case must depend upon its own circumstances; but, speaking generally, I should say that after a solicitor has accepted the employment and done any work in it for his client for which he could charge him if the scale did not apply, he has undertaken the business, and it is too late for him to elect under rule 6.

Now let me apply this rule to the case before me. The facts are these. The assigns of a lease were desirous to obtain from the lessor a renewal according to a provision for that purpose in the lease. Their solicitor accordingly wrote to the lessor on the 24th

(1) 29 Ch. D. 608.

(2) 33 Ch. D. 40.

(3) 29 Ch. D. 608.

(4) 33 Ch. D. 40.

Ante, p. 278.

Ante, p. 332.

of July, 1885, as follows:—[His Lordship read the letter, the effect of which is above stated, and continued]:—Thereupon the lessor, on the 25th of July, saw his own solicitors, and they, by his instructions, wrote on the same day as follows:—[His Lordship read the letter, the effect of which is above stated, and continued]:—that is to say, having been instructed in the matter by the lessor, they ask for proof that the applicants are the proper persons to call for the renewal. According to the diary of the clerk of the lessor's solicitors, they, on the 27th, "looked up the deeds," meaning, I suppose, the lease. On the 11th of August the applicants' solicitors sent an abstract of their title as assigns of the lease. On the 12th; according to the diary, the lessor's solicitors perused them, the entry being, "per Abst. 6 B. S."—meaning six brief sheets—the usual entry on which to found a charge for costs. On the 14th they attended on the lessor. On the 12th of September the applicants' solicitors wrote pressing for the draft lease for approval. On the 14th the lessor's solicitors wrote to the lessor for instructions, and on the 19th they attended on him. On the 21st they wrote to the applicants' solicitors, stating that they were in communication with the steward of the manor as to the admission of the lessor, and that when this was done they would send the draft leases for approval, and that they proposed to attend at the office of the applicants' solicitors to inspect the documents comprised in the abstract which had been sent.

The property being copyhold, and a license to demise being requested, the same day they wrote to the steward of the manor. On the 22nd of September they attended and examined the abstract of the applicants' title, with the deeds and documents. On the 2nd of October the solicitors of the assigns wrote pressing for completion. On the 9th the lessor's solicitors answered, expressing their regret for the delay, and saying that the matter was having their attention, and that they hoped to send the draft leases in a few days.

At this stage of the matter the lessor's solicitors, on the 19th of October, sent him a formal notice that on the grant of the leases "It is our intention to charge our costs thereof and incidental thereto in accordance with Schedule II."—that is, not according to the scale in Part II. of Schedule I. With this they sent an ex-

Appeal.
1886.

planatory letter stating that the object of the notice was "to endeavour to obtain from the lessees" their costs on this footing.

I am of opinion that, as between the lessor and his solicitors, the business was undertaken when they wrote to the solicitors of the assigns the letter of the 25th of July, which was part of the business for which they could charge the lessor; and that after that it was too late for them to elect. The Taxing Master's view seems to be that nothing before the 19th of October was business connected with the lease. With that I am unable to agree.

Then it was suggested that possibly they were not too late to elect against the assigns of the lease. These, by the terms of the power of renewal in the original lease, were liable to pay all costs except the lessor's costs of procuring the proper licenses and authorities to grant the same. The suggestion, as I understand, was that this might bring the assigns within the definition of "clients" in the Act of 1881. I do not find any evidence that notice of the intention to elect was given to the applicants; but I do not think that, even if such notice were given, it would be material. In my opinion the only person to whom notice to elect need be given is the lessor, and notice must be given before undertaking the business for him. The business, which commenced with the letter of the 25th of July, was all undertaken for the lessor, and was business for which his solicitors might charge him costs which the assigns under the provisions of the lease would have to repay, except only such part as related to obtaining the license to demise.

The application must be allowed, with costs.

The solicitors appealed, and the appeal was heard on the 12th of January, 1887.

Millar, Q.C., and *Allen*, for the appeal:—

The question turns on the interpretation of the expression "before undertaking any business." We contend that the business was not undertaken till the 19th of October, 1885, when instructions were given to prepare draft leases, and on the same day notice of option to charge under the old system was given. In July persons unknown to the lessor applied for a renewal. The business of the granting leases was not undertaken then, as it was necessary for the

applicants to show their title, and till it was shown that they had a title the business of granting the leases could not arise, nor until it was known that the lessor could obtain license to demise. The business for which the scale fee is given is "preparing, settling, and completing lease and counterpart." Suppose that in order to perfect the lessor's title it was necessary to take out letters of administration, could it be said that obtaining them was part of the business? This rule was intended to benefit solicitors, and it cannot have been intended that a solicitor should be precluded from his election by taking preliminary steps without which he could not know how to elect. The rule is properly construed as meaning that he must elect before undertaking the substantial part of the business. The business before the 19th of October was not business connected with the lease. *In re Emanuel and Simmonds* (1) shows that there may *Ante*, p. 332. be collateral matters which can be separately charged for.

Haldane, contra, was not called upon.

COTTON, L.J.:—

The question is whether the solicitors were sufficiently early in declaring their election to be remunerated according to the old system as modified by Schedule II. The rules fix the remuneration of solicitors for certain kinds of work, and they, no doubt, were framed after full inquiry what would be a fair remuneration for that class of work. It would be wrong to allow a solicitor, after he has done any part of the business covered by his retainer, to turn round and say, "The scale fee will not remunerate me; I elect to be paid according to the old system." This would give a solicitor a power of dealing with the scale in an unfair way by going on with the business until he found out which mode of remuneration would be most advantageous to him. Rule 6 says that the solicitor is to declare his election "before undertaking any business." It is argued that we must look to the schedule to see what the business is for which the scale fee is given, and that the business of "preparing, settling, and completing lease and counterpart" had not been undertaken when the notice was given. This would be a strong argument if we had only the schedule to look to, but we must also look at the

Appeal.
1886.

rules, and we find in rule 2 that the remuneration in the scale is given "in respect of business connected with leases." It includes, therefore, the whole of such business as can fairly be considered incidental to the granting of the lease. Now, according to my understanding of the English language, a solicitor "undertakes" a business when he accepts a retainer and agrees to do it. Had the solicitors accepted a retainer and undertaken to do this business before the 19th of October? In my opinion they had. The respondents instructed their solicitor to write to Mr Parr, which he did, stating that the respondents were entitled to renewed leases, and asking him to instruct his solicitors to prepare drafts. Mr. Parr took this letter to his solicitors and put it into their hands, and that is all we know of what passed on that occasion—there is no evidence as to what was said or what instructions were given. The proper inference, to my mind, is, that when Mr. Parr put the letter into the hands of his solicitors he directed them to act for him and prepare leases if the respondents were entitled to them, and if he had power to grant them. If it turned out that the respondents were not entitled, or that he had not power to grant the leases, the transaction would have been an incomplete transaction, for which the solicitors would have been entitled to be paid according to the old system as modified by Schedule II. But the transaction was completed, and, as it seems to me, it was completed in pursuance of the instructions given to the solicitors on the 25th of July. They wrote on that day to the respondents' solicitors: "Mr. Parr has seen us with your letter of yesterday, and the matters therein referred to shall have our attention"—*i.e.*, the whole of the matters, including the preparation of the leases if the respondents show themselves entitled to them. The business, as I think, was then undertaken. I do not suspect any wrong motive in making the entry of the 19th October in the diary, but I do not think that in the absence of any evidence as to what took place, or as to any fresh instructions or any new authority having been given, we can come to the conclusion that the business was not undertaken till that time. I do not give my opinion whether some part of the business done is not extra business not covered by the scale fee—that is not at present before us. We only decide that the solicitors undertook the business within the meaning of the rule when they

were instructed by Mr. Parr in July, and that the business is therefore not to be paid for according to the old system.

Appeal.
1886.

LINDLEY, L.J.:—

I am of the same opinion. The difficulty arises from the use of the obscure expression “before undertaking any business.” Rule 2 provides that “the remuneration of a solicitor in respect of business connected with sales, purchases, leases . . . and other matters of conveyancing,” shall be such as is prescribed by Schedule I. Apart from election, then, all the business connected with granting a lease is to be paid for according to the scale, and the solicitors here have to show that their remuneration is not to be according to this scale. Rule 6 provides that in cases to which the scale applies the solicitor may, “before undertaking any business,” elect that his remuneration shall be according to the old system as modified by Schedule II. I cannot, in the present case, see any ground for saying that the business was undertaken so late as October; it appears to me to have been undertaken in July. Persons claiming to be entitled to the old lease apply in that month to the lessor for fresh leases under a covenant for renewal. The lessor shows the letter to his solicitors, and asks them to attend to it. The solicitors, accordingly, enter into communication with the applicants, and the matter is carried on to completion. The solicitors, therefore, it is clear, undertook to attend to the business when the letter of the applicants was shown to them; and in my opinion that was “undertaking” the business within the meaning of the rule. It may be that some part of the business done was not business so connected with the granting the lease as to be covered by the scale fee; but to treat the business as not undertaken until the solicitor begins to prepare the drafts would be contrary to the true meaning of the rules.

LOPES, L.J.:—

I am of opinion that, as between the lessor and his solicitors, the business was undertaken on the 25th of July. The solicitors, by their letter of that date to the solicitors of the lessees, say: “Mr. Parr has seen us with your letter of yesterday addressed to him, and the matters therein referred to shall have our attention. We may say

Appeal.
1886.

that we think we ought to be furnished with sufficient extracts from or abstracts of the marriage settlement and probate referred to in your letter." That comes to this: "We have been instructed by the lessor to act for him in this matter, and we ask for evidence of your client's title." In my opinion the business was then undertaken, and the election by the appellants was too late.

Solicitors: *Parker, Garrett, & Parker; Allen & Son.*

Appeal.
1886.

HESTER *v.* HESTER.

(1879. H. 457.)

Nov. 26.
Dec. 4.
1887.
Jan. 19.

(*By permission*, from 34 Ch. D. 607; s.c. 35 W. R. 233; 55 L. T. 862; 56 L. J. Ch. 247.)

(Before KAY, J.)

Taxation—Bill of Costs—Solicitor and Client—Election Notice—"Undertaking any Business"—"Client"—Mortgagee—Subsequent Incumbrancer—Mortgagor—General Order under Solicitors Remuneration Act, 1881, rr. 6, 8.

The notice of election under Rule 6 of the General Order to the Solicitors Remuneration Act, 1881, must be given by the solicitor before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the order did not apply, it is too late for him to elect.

Ante, p. 348.

In re Allen (1) followed.

Per KAY, J.:—Where notice of election under the rule has been properly given by a solicitor to his client, a first mortgagee, it is binding on a subsequent incumbrancer, and also on the mortgagor.

A solicitor who acted for a mortgagee in relation to the mortgaged property received from the solicitors of the persons entitled to the equity of redemption a request that the mortgagee would sell under his power of sale, and in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorised he would, apart from the rules, under the Solicitors Remuneration Act, have been entitled to be paid, and which would be covered by the scale fee. The sale was completed:

Held (affirming the decision of KAY, J.), that a notice of election to be remunerated according to the old system, which was given by the solicitor after work of the above description had been done, was too late, although given before the contract was signed, for that as the client had ratified his proceedings he stood in the same position as if he had

received previous authority, and must be treated as having undertaken the business as soon as he did any work of the above description.

Appeal.
1886.

The Taxing Master having taxed according to the scale, an objection was taken, solely grounded on the notice to elect :

Held, that the Court could not enter upon the question whether there had been an agreement between the mortgagee and his solicitor that the latter should be remunerated according to the old system.

Whether, if the right to elect was gone, any such agreement would bind the parties entitled to the equity of redemption, *quære*.

SUMMONS to review taxation.

The action was by Mrs. Hester and her children, some of whom were infants, for the administration of the trusts of her marriage settlement. Part of the settled property consisted of the equity of redemption in a leasehold house at 7 Worthington-terrace, Forest Hill, Kent, which was subject to a first mortgage to Messrs. Kibble, Neighbour & Dudley, on which about £525 were due for principal, and to a second mortgage to one Becker. None of the mortgagees were parties to the action. It was desired to sell this house, and on the 21st January, 1884, Mr. Sidney Chapman, the plaintiffs' solicitor, wrote to Messrs. R. Smith & Wilmer, who had for some time acted as solicitors to the first mortgagees in relation to this property, stating that there was difficulty in preparing a contract of sale, as the trustees of the settlement had been discharged and no new ones appointed, and proposing an arrangement that the first mortgagees should sell under their power, with the sanction of the Court to be embodied in an order. On the 20th of June, 1884, an order was made, on the application of the plaintiffs, and on hearing solicitors for the incumbrancers, authorising the first mortgagees to sell the property under their power of sale to one Scott for £800, and directing them to retain out of the proceeds the amount of their mortgage debt, with interest from a given day, and an agreed sum for costs up to the 19th of December, 1883, and also their subsequent costs as mortgagees, such subsequent costs to be taxed by the Taxing Master, and £6 8s. for their costs of that application, and then to pay to the second mortgagee his debt and taxed costs and £5 4s. for his costs of the application, and to pay the balance, if any, of the purchase money into Court.

A contract was then prepared and sent to the plaintiffs' solicitor, at his request, but Scott, the proposed purchaser, refused to proceed

Appeal.
1886.

with the purchase; and after considerable negotiation a contract dated the 27th of June, 1885, was concluded for the sale to him at the price of £775, an order having been obtained by the plaintiffs' solicitor on the 5th of December, 1884, modifying the order of the 20th of June by authorising the first mortgagees to sell at that price instead of £800. On the 4th of June, 1885, prior to the contract being entered into, Messrs. Smith & Wilmer wrote the following letter to the plaintiffs' solicitor:—

“ 26 Lincoln's Inn Fields,

“ 4th June, 1885.

“ 7 Worthington-terrace.

“ DEAR SIR,—Messrs. Lewis & Son have now returned draft contract for sale of the leasehold interest in these premises to Mr. Scott for £775 approved, subject to certain alterations which they have made therein, the principal one being that they have struck out a clause which we inserted that, although the abstract should commence with the lease of 6th August, 1862, the vendors should not be bound, except at the purchaser's expense, to supply any abstract of title between such lease and the assignment to Mr. Hester. This we did because we find that the abstract with the title deeds, and which was delivered on Mr. Hester's mortgage, occupies fifty-seven brief sheets, and if to this is added, say, three sheets for the abstract of the mortgage and the transfer to the present trustees, the mere copying would come roughly to £10, leaving, if the charges are made according to the scale, only £2 to cover the costs of the present sale. It is clear that we cannot undertake to act as vendor's solicitors upon these terms; and as, under the 6th of the General Rules (in pursuance of the Solicitors Remuneration Act, 1881), we are at liberty to elect that our remuneration shall be according to the system existing at the date of such orders as altered by Schedule II., upon notice communicated to our client. before undertaking the business, we wish to inquire whether, as representing the persons entitled to the equity of redemption, you will agree to our costs, as vendors' solicitors, being paid as if we had given such notice. In any case we must, of course, make proper charges for the abortive contract, but this is a separate matter.—Yours truly,

“ R. SMITH & WILMER.”

Appeal.
1886.

On the 11th of June, 1885, the plaintiffs' solicitor replied that, as representing the parties entitled to the equity of redemption, he did not see anything objectionable in Messrs. Smith & Wilmer's election to charge on the old scale as altered by Schedule II., and that he would ascertain whether the second mortgagee entertained any objection. On the following day he wrote to Messrs. Smith & Wilmer to the effect that the second mortgagee appeared to have no objection.

The following letter was then written from Smith & Wilmer's firm to Kibble, on behalf of himself and the other first mortgagees:

" 26 Lincoln's Inn Fields,

" 13th June, 1885.

" 7 Worthington-terrace.

" MY DEAR SIR,—I am glad to tell you that the solicitors of Mr. Scott, the proposed purchaser of these premises, are now instructed that he will give £775 for them, and enclosed I send you for signature, as one of the vendors, the form of agreement which has been prepared, and which please sign and return to me, that I may obtain the signatures of your co-trustees. As the abstract of title in this case is rather long, owing to the numerous dealings that have taken place with reference to the property, I have communicated with Mr. Sidney Chapman, as the solicitor entitled to the equity of redemption, as to what would be the proper arrangement as to costs; and in accordance with the General Orders made in pursuance of the Solicitors Remuneration Act, 1881, I may mention that my firm elects that our remuneration should be according to the system existing previously to the Act as altered by Schedule II. annexed to the said orders. As the purchase-money is amply sufficient to pay the principal and interest due to the first mortgagees, as well as the costs, I should not refer to the latter, but the provisions to the Act above referred to seem to render it necessary that I should do so in order to prevent any question being hereafter raised by the second mortgagees.—Yours very truly,

" RICHARD SMITH."

It appeared that until the writing of this letter Messrs. Smith & Wilmer had had no communication with their clients as to this sale.

Appeal.
1886.

The bill carried in by Messrs. Smith & Wilmer, the solicitors to the first mortgagees, for taxation under the order of the 20th of June, 1884, was made out according to the system existing at the date of the General Order under the Solicitors Remuneration Act, 1881, as altered by Schedule II. to the order. The Taxing Master, however, refused to tax the bill, except upon the scale in Schedule I., Part I., to the order. According to this scale the charge allowed to the "vendor's solicitor for deducing to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)", is 30*s.* per £100 up to £1,000; so that the charge in the present instance, upon that scale, was £12; but it appeared that the cost of the abstract alone delivered by the vendors, the first mortgagees, amounted to £12 10*s.*, their solicitors being thus 10*s.* out of pocket.

The first mortgagees objected to their solicitors (whose costs were by the order of the 20th of June, 1884, to be added to the mortgage debt) being allowed a remuneration upon that scale only, alleging, as the ground for their objection, that their solicitors, "before undertaking the business, by writing under their hands communicated to them, elected that their remuneration should be according to the system in use at the date of the said General Order as altered by Schedule II. thereto."

The following were the Taxing Master's answers to the objection:—"It does not appear that Messrs Smith & Wilmer gave to their clients the notice in manner prescribed by the 6th clause of the preliminary part of the General Order made in pursuance of the Solicitors Remuneration Act, 1881. They gave such notice to Mr. Chapman, the solicitor for the mortgagor, an infant. There may be a surplus coming to this infant. The second mortgagee may also raise an objection. And if the notice had been given as prescribed by the 6th clause, I think that it would not operate against anyone but the client. The client, on receiving such notice, can refuse to let the solicitor proceed—a third party has no such option." The Taxing Master then certified the taxation according to the scale in the General Order, whereupon the first mortgagees took out this summons, asking that their objections to the taxation might be allowed, and for a reference back to the Taxing Master to vary his certificate accordingly.

It appeared that the second mortgagee, who had been served with the summons, had been paid, and that the plaintiffs, who had also been served, had declined, through their solicitor, Mr. Chapman, to oppose the application.

The summons was heard before Mr. Justice Kay on the 26th of November, 1886.

Ingle Joyce, for the summons:—

The Taxing Master insisted that to be effective the notice under rule 6 should have been given to all the parties interested in the property, and not merely to Messrs. Smith & Wilmer's own clients, the first mortgagees. I submit that he was wrong. Taxation is as between the solicitor and his client. The question is, who is the "client" within the meaning of rule? By rule 8 the word "client" is to have the meaning ascribed to it in the 3rd sub-section of sect. 1 of the Solicitors Remuneration Act, 1881, but that sub-section does not apply to this case, for it does not include the owner of the equity of redemption. I say the "clients" here were the first mortgagees, as being the "persons liable to pay the solicitor;" and therefore Messrs. Smith & Wilmer were right in giving notice to the first mortgagees alone. It is true that under the third party clause, sect. 38, of the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, a mortgagor may obtain taxation of a bill paid by his mortgagee, because that section entitled any person, not being "the party chargeable" with the bill, but liable to pay, to have the bill taxed, though, even then, the taxation is as between the solicitor and his client, the mortgagee: *In re Wells* (1). Under the Solicitors Remuneration Act, 1881, the party chargeable with the bill, and no one else, is the "client."

KAY, J.:—Before giving judgment I will speak to the Taxing Master on the point.

KAY, J.:—

1886. Dec. 4.

This case came upon a summons to review taxation.

The question raised is the same as that in a case I had before me a few days ago, *In re Allen* (2), upon the construction and meaning of rule 6 of the General Order under the Solicitors Remuneration

(1) 8 Beav. 416.

(2) 34 Ch. D. 433.

Appeal.
1886.

Act, 1881. The question seems to be whether proper notice of election was given by the solicitors to their clients, the mortgagees, before they undertook the business. Having some doubt as to what the exact ground of the Taxing Master's decision was, I said I would communicate with him, and he has been good enough to explain to me what the ground was. The answer he is stated to have given to the objection to the taxation was that the solicitors, Messrs. Smith & Wilmer, did not give their clients notice in accordance with the 6th clause of the preliminary part of the General Order.

He now informs me that the ground was that the notice was not given in time.

The facts of the case are these. [His Lordship stated them, and after reading Smith & Wilmer's letter of the 13th of June, 1885, continued]:—The Taxing Master's view is that the notice of election was too late, and in that view I entirely concur. As I stated in *Ante*, p. 348. *In re Allen* (1), the meaning of rule 6 is, that before undertaking the business the solicitor must make his election. He is not to begin the business and then, when he comes to a certain point, say he elects. That would be contrary to the meaning of the rule. The solicitor must elect in the first instance before he undertakes the business at all. Here the solicitors had most certainly undertaken the business before they wrote the letter of the 13th of June, as in fact appears from the terms offered. As I stated in the former case, after a solicitor has accepted employment from his client, and has done any work in it for which he could charge him if the scale under the order did not apply, it is too late for him to elect. Here the solicitors had done for their clients, in this very transaction, business for which they could have charged their clients under the old practice:—therefore, in my opinion, it was too late for them to elect.

There is another matter, which it is not absolutely necessary for me to consider for the purpose of my decision, but upon which I should state my opinion, because it is of importance.

The Taxing Master seems to have considered that even if the notice of election had been properly given, it would not have been binding upon the second mortgagee. With that opinion I do not

agree. Election is a matter entirely between the client—here the clients are the first mortgagees—and his solicitor. An election only puts the solicitor in the position in which he was before the scale was adopted ; and there appears to me to be no hardship in saying that if the election is properly made as between the solicitor and his own client, a first mortgagee, it would be binding as between the solicitor and a subsequent mortgagee. In my opinion it would be binding both as against the mortgagor and the second mortgagee.

My opinion is that the election made by the letter of the 13th of June was too late, consequently the decision of the Taxing Master is right, and the summons must be dismissed with costs.

Smith & Wilmer appealed, and the appeal was heard on the 19th of January, 1887. No one appeared to oppose it.

Appeal.
1886.

Ingle Joyce, for the appeal :—

1887. Jan. 19.

The decision of Mr. Justice Kay in *In re Allen* (1) having been affirmed by the Court of Appeal, it is necessary for me to distinguish this case from that. I say that, according to *In re Allen*, the business was not undertaken here till the 13th of June, since there has been no communication with the clients, and in *In re Allen* the accepting a retainer was considered as fixing the time of undertaking the business; there cannot be an “undertaking” without authority; the word must mean engaging with the client to do the business.

[LOPES, L.J.:—If a solicitor begins to do work without authority and then the client authorises it, does not the ratification relate back so as to carry back the “undertaking” to the time when the solicitor begins to do the work?]

I should say no. The solicitor is not bound to go on with the work unless he has communicated with his client. There is, therefore, no undertaking it in any proper sense of the word.

[LOPES, L.J.:—Does not the rule mean that a solicitor must elect before doing, in connection with the business, anything for which he would be entitled to be paid?]

The rule says before he has undertaken the business, and he has not undertaken it while he remains at liberty to withdraw.

Appeal.
1887.

The business done was not really the business which Messrs. Smith & Wilmer originally contemplated, the alteration in the length of the abstract having entirely altered the circumstances.

[LINDLEY, L.J.:—It occurs to me that possibly the correspondence may amount to a contract that the solicitors should be paid under the old system.]

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice Kay, who held that a notice of election to be remunerated according to the old system as modified by Schedule II., and not according to the scale in Schedule I., was too late. The clients were first mortgagees, and the trusts of the equity of redemption were being administered in a suit to which they were not parties. An order was made giving the first mortgagees liberty to sell under their power for £800. The negotiations with the purchaser went off, and subsequently an order was made giving them liberty to sell for £775. On the 13th of June, 1885, the solicitors wrote the letter electing to be paid not according to the scale, and the question is whether before that time they had undertaken the business, rule 6 requiring the election to be declared “before undertaking any business.” It was decided in *In re Allen* (1) that the business includes everything covered by the scale charge, though it be only something connected with the main business, and that the business has been undertaken if anything covered by the scale charge has been done.

Ante, p. 348.

Now, before the 13th of June what had taken place? The solicitors of the owners of the equity of redemption communicated by letter with Messrs. Smith & Wilmer, who were known to act for the first mortgagees about this property. Messrs. Smith & Wilmer received the letter, and acted upon it by doing various matters which would be covered by the scale charge. It is urged that they cannot be said to have undertaken the business, because they have not had any communication with their clients in the matter. I do not give any opinion how the case would stand if a solicitor who had no business relations with A. B. assumed to act for him, and then went to him saying, “I have taken these steps on your behalf

Appeal.
1887.

without authority, may I act for you in the matter?" Here the solicitors had acted for the first mortgagees for more than a year in relation to this property. I do not forget what was said by Lord Justice James in *Saffron Walden Second Benefit Building Society v. Rayner* (1) that it is a fallacy to suppose that a man has got a solicitor as an official solicitor, who, because he has been in the habit of acting for him, is to be considered his agent, to bind him by what he says, or to bind him by receiving notices or information. But, in my opinion, where a man employs a solicitor as to a particular property, the solicitor has a general authority not to do acts which bind the client without communication with him, but to enter into negotiations on his behalf. Here, before the 4th of June, 1885, Messrs. Smith & Wilmer having their general authority, prepared a draft contract and sent it to the proposed purchaser. Their acts not having been repudiated by their clients, they must be treated as having acted by their authority all along, and as having undertaken the business, not on the 13th of June but at a much earlier date, on the strength of an implied authority which has been ratified. Their notice of election, therefore, came too late.

It is said that after Messrs. Smith & Wilmer had begun to deal with the contract an alteration was made as to the length of the abstract to be furnished, which made such an alteration of circumstances that the business to be done cannot be considered the same as was originally undertaken. If the alteration had been the substitution of one estate for another, then probably there would have been the undertaking of a different business, but here the negotiations relate to the same estate, and there it is only a variation in the terms of the contract. The case is a hard one on the solicitors, but as the scale fee for a sale covers all expenses connected with the contract, though incurred before the contract is entered into, for Schedule I. expressly states that the scale fee to the vendor's solicitor includes the preparation of the contract (if any), we cannot avoid holding that work covered by the scale fee had been done before the 4th of June, and that the business had therefore been undertaken before that date.

It was suggested by Lord Justice Lindley that what passed may have amounted to a contract that the remuneration should not be

(1) 14 Ch. D. 406.

Appeal.
1887.

according to the scale. But this question is not raised by the objections taken in to the Taxing Master, nor is there anything to show that the client agreed to the terms of the notice. This point ought to have been brought before the Taxing Master and evidence adduced upon it, and as that was not done we are precluded from considering the question. Supposing such an agreement with a client were proved the solicitors still would not have a clear case, for if they had lost their opportunity of giving an effectual notice of election, it is questionable whether any agreement by their client with them as to their remuneration would bind the subsequent mortgagees or the parties entitled to the equity of redemption. The appeal must be dismissed.

LINDLEY, L.J. :—

I have come to the same conclusion. The bill is made out according to the old system as modified by Schedule II. The Taxing Master thought that wrong, and considered that the remuneration must be according to the scale. An objection to his taxation was taken in, not on the ground that there was an agreement for remuneration otherwise than according to this scale, but on the ground that the solicitors on the 13th of June had given notice of election to be remunerated according to the old system. The right to elect is quite independent of agreement, and as the solicitors' objections went on the right to elect, we are confined to the question whether they had that right. This turns on the question whether they had previously "undertaken the business." *Ante*, p. 348. I admit that the case is different from *In re Allen* (1), because here the client has given them no directions to act for him before the 13th of June. But if a solicitor commences a business on the faith of a general retainer, and in the belief that his client will adopt what he does, he cannot be heard to say that the business was not undertaken when he first did any work covered by the scale fee. I therefore agree that the notice of election was too late.

LOPES, L.J. :—

I am of the same opinion, and have nothing to add.

Solicitors: *Smith & Wilmer.*

Ex parte MAYOR OF LONDON.

Kay, J.
1887.

(1885. L. 1,192.)

Jan. 13.

(By permission, from 34 Ch. D. 452; s. o. 35 W. R. 210, 56 L. T. 13, 56 L. J. Ch. 308.)

(Before KAY, J.)

Solicitor—Bill of Costs—Taxation—Purchase—Statutory Title—Scale Charge—Percentage—“Investigating Title”—General Order under Solicitors Remuneration Act, 1881, Schedule I., Part I.

The Corporation of London resolved to purchase the old Bankruptcy Court, which, under section 68 of the Bankruptcy Act, 1861, was vested in the Public Work Commissioners, the purchase money—£93,500—being payable out of funds in Court under various Acts, including the Lands Clauses Act, and representing lands of the Corporation taken by certain public bodies. On applying to the Commissioners the Corporation were informed that the property was vested in the Commissioners under the above section, and that they “did not agree to furnish any evidence of title,” but would apply to the Lord Chancellor, under the section, for his authority to sell; and they subsequently wrote that the Lord Chancellor had authorised the sale by his secretary. The city solicitor, however, having regard to the terms of the section, required a written authority, signed by the Lord Chancellor himself, which was duly obtained. The solicitor, having thus satisfied himself as to the Commissioners’ title, obtained, on summons in Chamber, an order sanctioning the purchase, the Chief Clerk, upon the production of the Lord Chancellor’s authority, and at the request of the solicitor, dispensing with the usual reference as to title. The purchase having been completed, the Corporation carried in their solicitor’s bill for taxation, containing a charge of £278 15s. 0d., according to the scale in Schedule I., Part I., of the General Order under the Solicitors Remuneration Act, 1881, for “investigating title and preparing and completing conveyance.” The Taxing Master disallowed the charge on the ground that there had been no investigation of title, and that, therefore, the scale charge did not apply: *In re Lacey & Son* (25 Ch. D. 301).

Ante, p. 238.

On a summons by the Corporation to review the taxation:

Held, that there had been an “investigation of title” within the terms of the General Order, and that, therefore, the scale charge applied.

ADJOURNED SUMMONS.—In May, 1885, the Court of Common Council of the Corporation of London passed a resolution to purchase from the Commissioners of Her Majesty’s Works and Public Buildings the buildings and site of the old Bankruptcy Court in Basinghall-street for £93,500. As the purchase money had to

Kay, J.
1887.

be provided out of the funds in Court representing purchase money of lands of the Corporation taken, under the Lands Clauses Act and certain Acts relating to the metropolitan railways and to the improvement of the metropolis by the Metropolitan and Metropolitan District Railway Joint Committee and the City Commissioners of Sewers, the costs of the re-investment of those funds were payable by those two bodies.

No formal agreement for the purchase was entered into; but, in reply to a letter from the city comptroller announcing that, at a meeting of the Court of Common Council, the Corporation had agreed to purchase the property, the solicitor of the Treasury, on the 24th of June, 1885, wrote thus:—"The property was vested in the Commissioners of Her Majesty's Works, &c., under and by virtue of the Bankruptcy Act, 1861 (24 and 25 Vict., c. 134, s. 68), and is to be appropriated to such purposes as the Lord Chancellor shall direct. The Commissioners do not agree to furnish any evidence of title, but they will apply to the Lord Chancellor for directions to sell and convey the property to the Corporation. In the meantime a draft conveyance may be sent to me for perusal." In a subsequent letter the Treasury solicitor stated that the Lord Chancellor had authorised the Commissioners of Works to sell the property to the Corporation.

The matter was then referred to the city solicitor, who, upon perusing the Bankruptcy Act, considered that an authority signed by the Lord Chancellor should be obtained; whereupon, the city comptroller, at his suggestion, wrote asking for a copy of the document signed by the Lord Chancellor authorising the sale in order that it might be set out in the summons for payment of the purchase money out of Court. In reply, the Treasury solicitor said the only document the Commissioners then had was a letter from the Lord Chancellor's secretary, but that he would obtain a formal authority signed by the Lord Chancellor himself. This formal authority was shortly afterwards obtained and sent to the city comptroller.

The city solicitor then proceeded to instruct counsel to prepare the necessary summons for the sanction of the Court to the purchase, and in the draft the usual clause was inserted asking for an inquiry whether a good title could be made to the property,

and that, in case a good title could be made, a proper conveyance might be settled by the judge in the usual way. Subsequently, however, upon examining and perusing the 68th section of the Bankruptcy Act, 1861, and the formal direction or authority signed by the Lord Chancellor, the city solicitor satisfied himself as to the title of the Commissioners, and, to save time, instructed counsel to amend the draft summons by striking out the clause asking for an inquiry as to title, as he hoped, after his own investigation, to be able to satisfy the Chief Clerk that the title was good without a formal reference to the conveyancing counsel to investigate it.

Kay, J.
1887.

Upon the summons coming on before the Chief Clerk he, upon the production of the Lord Chancellor's direction, and upon the representation of the city solicitor, made an order sanctioning the purchase, the inquiry as to title being dispensed with, and the only reference being to the conveyancing counsel to settle the conveyance. The costs of the Corporation of, and incident to, the purchase and the re-investment were, in the usual form, directed to be taxed.

The conveyance having been executed, and the purchase duly completed, the Corporation carried in their solicitor's bill of costs for taxation. One item was a charge under the scale in Part I. of Schedule I. to the General Order to the Solicitors Remuneration Act, 1881, as follows:—"Scale charges on purchase money, £93,500. Purchase, £278 15s."

The Taxing Master held, on the authority of *In re Lacey & Son* (1), that the scale did not apply to the case as there was no investigation of title on the part of the Corporation, and that consequently the charge should not be made by scale under Schedule I., but should follow the old system of charging prior to the Act as altered by Schedule II. The item was accordingly disallowed. The Corporation then carried in objections to the taxation, insisting that Schedule I. applied, but the Taxing Master overruled the objection. The Corporation then took out the present summons to review the taxation. The summons was supported by an affidavit by the city solicitor of the facts above stated.

Ante, p. 238.

Kay, J.
1837.

Sir A. Watson, Q.C., and Tweedy, for the Corporation:—

Ante, p. 238.

In re Lacey & Son (1) merely decides that the scale in Schedule I. to the General Order under the Solicitors Remuneration Act, 1881, does not apply unless the whole of the business in respect of which the charges imposed is done. The charge in Part I. of Schedule I. "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)," is applicable to the present case. Here the whole of that business has been done, including investigating the title; for, as a matter of fact, our solicitor did investigate the two documents of title—namely, the Bankruptcy Act, 1861, and the Lord Chancellor's direction. The scales under the Solicitors Remuneration Act apply to all conveyancing business, whether done in an action or matter or out of Court: *Stanford v. Roberts* (2): *In re Merchant Taylors' Company* (3).

Ante, p. 248.

Ante, p. 294.

Fairwell, for the Metropolitan Joint Committee and the Commissioners of Sewers:—

The charge is excessive for merely reading a letter and an Act of Parliament, and ought not to be allowed. The title was a statutory one, open to the world, and one which everybody knew. There was in reality no "investigation of title" at all; and, in fact, the Commissioners decline to furnish any evidence of title. Consequently, *In re Lacey & Son* and also *Re Glascòdine and Carlyle* (4) apply.

Ante, p. 238.

Ante, p. 308.

KAY, J.:—

I am extremely sorry I cannot in this case agree with the Taxing Master.

The question arises under these circumstances—[His Lordship stated them, and continued]:—so that what the city solicitor did was this: being referred by the vendors to a Public Act under which they acquire their title, and under which they were proceeding to sell, he read it, examined it, and came to the conclusion upon it that something more was wanted than a mere Act of Par-

(1) 25 Ch. D. 301.

(2) 26 Ch. D. 155.

(3) 30 Ch. D. 28.

(4) 52 L. T. (N.S.) 781.

liament, and that a formal authority signed by the Lord Chancellor was required. Accordingly, he applied for and obtained that formal authority, which he would not have understood was wanted without having investigated the Act of Parliament; and thereupon he satisfied the Chief Clerk that it was not worth while to have a reference to the conveyancing counsel as to title, and the purchase was completed on that investigation.

Now, I am told that this is not an investigation of the title. I have put several points to counsel, which have not, to my mind, been satisfactorily answered. Suppose, instead of one Act mentioned by the vendors, they had mentioned half a dozen public Acts, and said—"Under and by virtue of all these six Acts of Parliament which we give the reference to, all being public Acts of Parliament, these properties are vested in us, and we have the power of sale;" and suppose the city solicitor, instead of reading one, had read six Acts of Parliament, would that have been an investigation of title or not? To my mind there is only one possible answer. It does not matter how many Acts there were, or how long or short the title was. The question is, was the title investigated?

Again, it is said no abstract was furnished, the vendors saying—"We are not going to give you any evidence of title;" but did that make it less necessary for the solicitor to investigate that which they said was their title? There may be an investigation of title without any abstract. There may be investigation of title without any evidence of title being furnished by the vendor. The reason here is manifest. The Commissioners in effect said—"We are not going to give you any evidence of title, because the evidence of this title, being a public Act of Parliament, is so easily accessible to you that we need not supply you with a public Act of Parliament." That is all the Commissioners meant. They did not mean that the city solicitor was not to investigate that public Act of Parliament, and the solicitor would have been grossly wanting in his duty if he had not investigated it with the utmost possible care.

Again, I put this question to counsel, to which no satisfactory answer has been given. Suppose this inquiry as to title had been retained, and the title had been referred to the conveyancing

Kay, J.
1887.

counsel; after the solicitor had read the Act of Parliament, suppose he had not been quite satisfied without the opinion of the conveyancing counsel, and had proceeded to take it, would there have been no investigation of title then? I have heard no answer to that at all; you cannot say there is no investigation of title because the title is a very short one, or because the title is a very easy one to investigate, or because the investigation took only five minutes instead of ten days. The question is, has there been an investigation of title? Here the title was a public Act of Parliament, which vested this property in the vendors. Whether it gave them a power of sale or not was a question which the city solicitor had most carefully to consider, and his consideration of it led to his requiring a formal authority from the Lord Chancellor. It was in consequence of that investigation of the Act that the formal authority was obtained.

Now, it is not my duty to consider whether the General Order under the Solicitors Remuneration Act produces a hardship or not. In this case this work is, beyond all question, greatly overpaid; and it is not the first case which has come under my personal notice in which solicitors have got very great advantage by this General Order, but I have nothing to do with that. If the Act and the Order under it have produced that effect, that is what the Legislature, I presume, intended. I am not going to misconstrue the General Order, or refuse to carry it into effect, or to make that which I think would be bad law because it produces a hardship. This is an argument I cannot listen to for a moment. I say I should have been very glad, indeed, if I could have come to another conclusion; but this would be impossible, unless I could satisfy myself that there had been no investigation of title whatever. I am not satisfied of that; I think there has been investigation of title.

The General Order refers to several things. It says that the scale charge in Schedule I., Part I., applies "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)." All that has been done in this case. The conveyance has been prepared and completed. There was no contract to peruse; but the scale charge applies whether there was a contract

or not. It is, said, however, that the one other item—the investigation of title—has not been made. From that I dissent; there has been an investigation of such title as there was, and I therefore am sorry to say that I must differ from the Taxing Master, and allow the summons, with costs.

Kay, J.
1887.

Solicitors: The City Solicitor, *Baxters & Co.*

Re GREY'S BREWERY COMPANY.

Chitty, J.
1887.

(*By permission, from 56 L. T. 298; s. c. 31 S. J. 219.*)

Jan. 20.

(Before CHITTY, J.)

Solicitor—Taxation—Estate sold subject to incumbrances—General Order under Solicitors Remuneration Act, 1881; (44 & 45 Vict. c. 44), Part 1., r. 9.

The property of a company in liquidation was sold by the solicitors of the official liquidator for £24,000 (subject to a mortgage of £900), and after the satisfaction of the claims of former successive owners a sum of £1,750 remained for the official liquidator. The sale was confirmed by an order made in the liquidation, and the parties to the conveyance were the company, the official liquidator, the original owners, and certain intermediate purchasers who had claims for unpaid purchase money. The solicitors on taxation included in their bill of costs scale charges as upon a sale for £24,900 as follows: negotiating, £102 5s., deducting title and completing, including contract, £107 5s.

The Taxing Master disallowed the negotiating fee, and only allowed the scale charge upon the £1,750.

On summons to review taxation:

Held, that the Court could look not only at the contract but at the substance of the transaction, and that, having regard to the whole of the matters with reference to the provisional contract coupled with the order, the liquidator's name was only used for the purpose of convenience, and that the Taxing Master's decision was right.

THE original owners of the Grey's Brewery and of a number of public houses attached to the brewery sold these properties in the year 1878 to a firm of practical brewers. The brewers were unable to pay the whole of the purchase-money. The original owners, however, deduced their title to the property under the agreement for sale, and let the brewers into possession, but they did not execute a conveyance of the property, and retained possession of the title

Chitty, J.
1887.

deeds. The brewers in the year 1879 sold the property at an advanced price to a person whom they let into possession on completion of the contract, and who immediately transferred the property to the Grey's Brewery Company, Limited, again at an advanced price, and without completing the purchase. As the transferor to the company did not carry out his contract with the brewers they brought an action against them, and obtained an order for specific performance. In 1882 the Grey's Brewery Company was ordered to be wound-up compulsorily, and an official liquidator was appointed. In the year 1884 the original owners pressed for a sale of the brewery in order that their unpaid purchase-money might be paid off, and the official liquidator requested them through their solicitors to find a purchaser. Accordingly the solicitors, with the official liquidator's sanction, arranged with the solicitors of the liquidator to act as their agents in the matter, and finally they found a purchaser of the property for £24,000, subject to a mortgage for £900. The purchaser was represented in the negotiations by an auctioneer and valuer, but no auctioneer or valuer was employed or paid any commission on behalf of the vendors. The solicitors then prepared a contract between the liquidator, as vendor, and the ultimate purchaser, which was executed on the 13th June, 1885, and a deposit of £1,200 was paid by the purchaser to the liquidator. An arrangement was come to between the liquidator and the parties having liens on the property that the purchase-money should be divided as follows:—"Purchase money, £24,900; to be left on mortgage, £900; balance, £24,000. The purchase-money was made up thus: deposit, £1,200; to be paid to original owners, £21,000; to be paid to the brewers, £1,800." The solicitors did not act for the brewers or for the ultimate purchaser, both of whom were represented by other solicitors. A further arrangement was made between the liquidator and the brewers that, upon completion, the brewers should pay to the liquidator on behalf of the company £550 by way of compromise, and in discharge of all claims of the liquidator upon them.

By an order made in the liquidation in June, 1885, the sale was confirmed on the footing that the liquidator was to receive £1,750, and the court fee (No. 69 in the Supreme Court Fees Order, 1884) was calculated upon the £1,750.

The sale was completed in August, 1885, and a conveyance executed, the parties to which were the company, the liquidator, the original owners, the brewers, and the person to whom the property had been conveyed preparatory to the formation of the company.

In November, 1885, the solicitors' costs were taxed in the liquidation, and they included in their bill scale charges as upon a sale of £24,900 as follows:—"Negotiating, £102 5s.; deducing title and completing, including contract, £107 5s."

The Taxing Master disallowed the negotiating fee, and only allowed £22 10s. for deducing and completing, being the scale charge upon the £1,750 received by the liquidator. The solicitors carried in objections to the taxation, contending that the company was owner in equity of the property, and that the official liquidator was, throughout the transaction, responsible as vendor; that the business of the brewery had greatly depreciated, the company realising much less than had been anticipated, but that nevertheless it was essential in the winding-up of the company that the assets should be sold; that the official liquidator and the solicitors arranged the sale and price, and the terms and conditions thereof, and that no commission was paid to any auctioneer or estate or other agent; and the solicitors claimed that the negotiating fee and the deducing scale fee must both be calculated upon the entire and undivided amount of the purchase money. The Taxing Master disallowed the objection on the ground that the solicitors were also the solicitors for the original owners, the parties most interested in the sale of the property, and who received the greater portion of the purchase-money, and that the order sanctioning the sale provided for the payment to the liquidator of £1,750, and that the court fee was only found on that sum, and that he had, therefore, allowed the scale charge on that amount. The Taxing Master further stated that the amount paid for the property included plant, goodwill, fixtures, &c., and that the solicitors could not, in any case, be entitled to the scale charge on the value of that portion of the property, they being only entitled, in any case, to charge on the value of the leasehold premises, and that the amount paid to the liquidator was not the balance on taking an account, but a lump sum for the liquidator's interest, whatever it might be.

Chitty, J.
1887.

This was a summons to review the taxation.

Whitehorne, Q.C., and *Beale*, for the summons, submitted that the Taxing Master's decision was wrong on the true construction of rule 9 of Part I. of the General Order to the Solicitors Remuneration Act, 1881, which provides that "where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption."

Romer, Q.C., and *Beddall, contra*, were stopped by the Court.

CHITTY, J.:—

The view of the Taxing Master was, that this was a sale by the liquidator for £1,750, and in calculating the scale fee he acted on that footing. It is true that the solicitor for the liquidator took no active part in the negotiations which resulted in the sale, which were carried through by the solicitors for the original vendors. But the only solicitor recognised by the Court on this application is the solicitor to the liquidator. There was a formal contract entered into by the official liquidator, according to which the property was to be sold for £24,000. If I had to decide the case upon the formal contract alone, the Taxing Master's decision would be erroneous; but that is not the whole of the case. Here the original vendors sold the property to the intermediate purchasers, who in their turn sold it to the company. The original vendors had a lien on the property to the extent of £21,000, and they had not parted with the legal estate. There was nothing coming to the company out of the sale for £24,000, because the claim of the first vendors exceeded £21,000, and the claim of the intermediate purchasers more than exhausted the balance. The official liquidator came to the arrangement for the sale in order that he might obtain the settlement of a cross-claim which he had against the intermediate purchasers, who had been promoters of the company. The contract for the sale for £24,000 entered into by the official liquidator was not binding until it had been sanctioned by the Court. The order was one which bound all parties, as it

provided that £21,000 should be paid to the original vendors, £1,800 to the intermediate purchasers, and £1,750 to the official liquidator, by way of compromise and in full discharge of any claims he might have against the intermediate purchasers. In the affidavit made by the official liquidator upon the application for the order to confirm the contract, he stated that the intermediate purchasers had requested him to sell the property, and as an inducement to him to do so, they offered to pay him £1,750 in compromise of his claims against them, and also in discharge of the claim for costs set up by the former solicitors to the company; and on this understanding the official liquidator allowed his name to be used as a matter of convenience. The official liquidator's instructions to his solicitors with regard to the preparations of the contract were, that he was willing to concur in the sale of the company's interest in the brewery for £24,000. To hold, however, that the official liquidator was merely a concurring party would be to take too narrow a view as against the solicitors. The substance of the case, when the matter is looked at in all its bearings, is that the liquidator sold whatever interest the company had in the concern for £1,750. It was argued that it was a sale subject to incumbrances; but on the facts as stated it was not that, inasmuch as the liquidator would get his £1,750 whatever the amount of the incumbrances might be; therefore it was the sale of the interest of the company for £1,750, and that being so, the Taxing Master was right in applying the scale to that amount. The Taxing Master allowed nothing for the negotiation, and in this, I think, he was right, because the negotiations were those of the vendors, the parties principally interested. There were no negotiations for a sale on behalf of the official liquidator, though there were some with reference to a compromise of a claim. As a matter of principle as between a vendor and his own solicitor, I think in many cases it would not be right to look at the contract for sale; but I think the substance of the transaction should be gone into. But in no case would the solicitor, even if he were so minded, be allowed to put the transaction in such a form as to be entitled to the larger fee. However, there is no pretence for making such a suggestion in the present case. My judgment turns mainly on this consideration, that, looking at the whole of the matters with reference to the

Chitty, J.
1887.

provisional contract, coupled with the order which made it binding on all the parties interested in the property, the liquidator's name was used in the provisional contract merely for the purpose of convenience, namely, for the convenience of all the parties. The result therefore is, that the Taxing Master's decision must stand.

Solicitors: *Croft, Lawrence, Baker, and Waldron.*

Exchequer.
1887.

Jan. 27, 29.

LONG v. FITZGIBBON.

(1886. J. No. 402.)

(By permission, from 20 L. R. Ir. 12; s. c. 21 Ir. L. T. R. 13.)

(Before DOWSE, B., and ANDREWS, J.)

Costs—Judgment for £20—General Order VIII., r. 3—Common Law Procedure Act, 1853, s. 243—Practice.

A judgment for £20, exclusive of costs, entered, by leave of the Court, under General Order XIII., r. 1, after appearance carries only such costs as are allowed by General Order VIII., r. 3.

MOTION for an order to review the taxation of the plaintiffs' costs.

The action was brought to recover the sum of £20, arrears of rent, due by the defendant out of premises situate in Bath-avenue, Donnybrook, county Dublin, and held by the defendant under a monthly tenancy. The writ was specially indorsed with the particulars of the plaintiffs' claim.

The plaintiffs resided in the city of Dublin and the defendant in the county of Dublin. The defendant entered an appearance, and the plaintiffs thereupon moved for final judgment. On the 19th November, 1886, an order was made for final judgment and costs. On the 6th December, 1886, judgment was entered for £20. The plaintiffs lodged their bill of costs, amounting to £13 Os. 9d., with the proper officer for taxation. The bill was accordingly taxed by Mr. Robinson, one of the taxing officers; and the Taxing Master made the deductions specified in General

Order VIII., rule 3, and allowed the plaintiffs half the costs of the action. The plaintiffs having objected to the taxation, the bill came a second time before the Taxing Master on the 20th January, 1887, and on that day the Master certified the amount of the taxed costs at £5 9s. 7d. On the 24th January, 1887, the Taxing Master reported that under General Order VIII. (of April, 1878), rule 3, the plaintiffs were entitled to half costs.

Exchequer.
1887.

Samuels, in support of the motion:—

The plaintiffs are entitled to the full costs of the action. Section 243 of the Common Law Procedure Act, 1853, provides “that in case the plaintiff in any action of contract . . . shall recover, exclusive of costs, less than £20” he shall be entitled to no more than one-half the ordinary costs. In this case the plaintiffs’ claim is above the limit laid down in that section. Section 53 of the Judicature Act preserves the former provision. That question was decided in *Lapsley v. Blee* (1), in which case it was held that the 53rd section of the Judicature Act, and Order VIII., rule 2, of 1878, did not repeal the provisions of the 97th section of the Common Law Procedure Act, 1856, and that the provisions of the latter section remain in force. It is clear, therefore, that section 243 of the Act of 1853, as well as section 97 of the Act of 1856, which are the two sections dealing with costs, remain in full force and effect, and that the amount here is above the limit giving only one-half the costs. The Taxing Master relied on General Order VIII. (Eiffe, 696). That Order is headed “Costs in Cases of Settlement of Action, Judgment by Default, &c.” Rule 2 of that Order deals with costs of judgment by default, and rule 3 deals with cases of settlement. This is not a judgment by default or a case of settlement. The latter rule contains the words, “the principal sum for which judgment shall be marked;” but the words “on settlement of an action” must be read into the rule, and the rule as it is worded could not be said to repeal the provisions of the Common Law Procedure Act, 1853. The Order itself was clearly intended to deal with cases of settlement of action and judgment by default, and the only way in which it could be construed as applying to other cases would be

(1) 6 L. R. Ir. 155, 161.

Exchequer.
1887.

the word "&c." It would be a very wide interpretation to put on that word; and if the framers of the Order intended it to govern all cases it is unlikely it would have been headed in this way. The word "&c." applies to the fourth rule of the Order, providing for the taxation of costs where two actions are brought upon the same bill of exchange.

There was no appearance for the defendant.

Cur. adv. vult.

Jan. 29.

DOWSE, B.:—

This was an application for an order on the Taxing Master to review his taxation of a bill of costs. The plaintiff has brought his action to recover a sum of £20. He made an application for final judgment on the writ, which was specially indorsed. The Court made an order for judgment. The plaintiff marked judgment for £20, and when he brought his costs for taxation the Taxing Master refused to allow him the full costs of the action. The plaintiff relied on section 243 of the Common Law Procedure Act, 1853, which enacts that if the plaintiff shall recover, exclusive of costs, a sum less than £20 he shall only get half the costs of the action. Mr. Samuels argued before the Taxing Master and here that having recovered £20 he is entitled to his full costs. No doubt, by section 53 of the Judicature Act the statutes regulating costs purport to be preserved in full force and effect. That statute deals with costs "subject," as it says, "to all existing enactments," &c.; and if the case depended on this section alone Mr. Samuels would be probably right. The 61st section, however, of the same Act, sub-section 3, gives full power and authority to the judges to make rules regulating the costs of proceedings in the Superior Courts. An order made and approved of, as pointed out in that section, has the effect of an Act of Parliament; and an Order has been made, entitled General Order VIII., to be found in page 696 of Eiffe, upon the provisions of which Order this case depends. General Order VIII. is entitled "Costs of Cases of Settlement of Action, Judgment by Default, &c." Mr. Samuels contends that this Order does not refer to any judgment marked, unless by way of settlement of the action, or by default; and, in answer to me, he says that the "&c." is explained by the provisions

contained in Rule 4 of General Order VIII. I do not take that view. On the contrary, I am of opinion that this Order deals with all judgments by default or otherwise. No doubt, the drafting of the Order might easily have been better, especially with reference to the vague word "&c." But, on the whole, I think there is no reasonable doubt as to its construction. Rule 1 of General Order VIII. has been rescinded. That Rule dealt with the settlement of actions within six days after service of the writ, and it is necessary, in construing the General Order, to take it as it stood when it was originally passed. This case depends upon Rule 3, which enacts as follows:—"In cases where the amount paid upon settlement, or the principal sum for which judgment shall be marked, shall exceed £10, but shall not exceed £20, there shall be allowed no fees for instructions, attendances, term fees, or correspondence, and all other fees for any work done shall be reduced to one-half of the fees allowed by the schedule of fees so fixed and approved of by the seventh of these Orders."

Exchequer.
1887.

It is impossible, in my opinion, to construe the words, "or the principal sum for which judgment shall be marked shall exceed £10, but shall not exceed £20, there shall be allowed," &c., as applying only to judgments by default or judgments marked in pursuance of a settlement.

It is admitted that these words apply to judgments by default, and to that extent repeal the 243rd section, above referred to. Why should they not apply to all judgments, no matter how marked or under what circumstances?

I cannot say that the case is free from doubt, in consequence of the way in which the Order is constructed; but I cannot disturb the settled practice of the Taxing Masters, unless I was clearly satisfied that the practice was wrong.

There must, therefore, be no rule on the motion.

ANDREWS, J., concurred.

The plaintiffs appealed.

The Court of Appeal (Lord Ashbourne, C., and FitzGibbon and Barry, L.JJ.) affirmed the decision of the Exchequer Division.

Appeal.
1887.

Feb. 14.

Solicitor for the plaintiffs: *A. Samuels.*

M. R.
1887.

In the Matter of THE SOLICITORS' REMUNERATION
ACT, 1881; *Ex parte* O'HAGAN.

Feb. 14, 22.

(By permission, from 19 L. R. Ir. 99; s. c. 21 Ir. L. T. 164.)

Practice—Taxation of Costs—Solicitors' Remuneration Act, 1881—General Order, 16th April, 1884—Schedule II.

In taxation between solicitor and client, cases for counsel to advise trustees whether they should require a release from their *cestui que trusts* on their discharge, statements for the information of the client as to the investment of the trust funds and the prudence of changing it, or directions to the trustees, signed by the client, consenting to the change of investment, and directing a new investment, are not included in Schedule II. of the General Order to the Solicitors' Remuneration Act, 1881, but are taxable under the scale of fees prior to that Act.

SUMMONS to review taxation of costs as to items disallowed which are specified in the judgment.

Mr. Bewley, Q.C., for the solicitor.

Feb. 22.

THE MASTER OF THE ROLLS:—

This case came before me on a summons by Mr. John O'Hagan, one of the solicitors, that it may be referred back to the Taxing Master to review his taxation in respect of certain items of charge in two bills of costs of the applicant, taxed on the 29th October, 1886, which the Taxing Master has disallowed.

This application is conversant with three different matters:—

1st. The preparation of cases for counsel:—"Instructions for case for counsel on behalf of retiring trustees to advise if they should obtain any release in consequence of so many dealings with the trust funds, and the large amount of them, also as to the necessity of submitting names of proposed trustees to mortgagees on Mr. Barry's life estate in funds;" and also another case for Mr. and Mrs. Barry as to the security to be given by them to the Standard Insurance Company for a loan.

2ndly. Another of the matters is a statement prepared by the solicitor for his client, setting forth the particulars of the present investment of the trust funds, and the effect of the issue of new

stock upon the trust funds. The statement is carefully prepared and accurately drawn, so far as I can see.

3rdly. The third matter is in relation to written directions signed by Mr. and Mrs. Barry, testifying their consent to a change of investment and reinvesting the amount in other securities.

These are all matters properly chargeable against the client. The Taxing Master has taxed these according to the scale in use prior to the Solicitors' Remuneration Act of 1881.

The short point in the case is, whether the Master was right in taxing the costs according to the scale in use prior to the Act, or whether the solicitor was entitled to have them taxed at the rate of two shillings per folio, being the rate fixed by the rules under the Solicitors' Remuneration Act in respect of the preparation of certain documents, and provided by Schedule II. of those Rules.

When the case came on, Mr. Bewley, on the part of the applicant, informed me that the matter was one in which the Council of the Incorporated Law Society took a considerable interest, and specially requested me to communicate with the Taxing Officers in England in reference to the practice then existing under similar rules. Though I did not feel much doubt on the question, I thought it right, when so requested, to take this course, supposing that I should hardly have been invited to take it without some grounds. Mr. Bewley, I am bound to say, did not suggest that there were any such grounds. The English rules under the Act, though not in all respects identical with, are very similar to those in this country, which were framed after the model of the English rules, with such variations as were necessitated by the difference in law and practice existing in this country. I have accordingly made inquiry from the Taxing Officers in England as regards the preparation of cases for counsel, and have been informed that it has never been held that cases for counsel came within the General Order. This is entirely in accordance with my own opinion.

The Act of the 44 & 45 Vict., c. 44 (the Solicitors' Remuneration Act), s. 2, gives power to the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President for the time being of the Incorporated Law Society, or any three of them,

M. R.
1887.

the Lord Chancellor being one, to make any General Order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, or in respect of any other business not being business in any action or transacted in any Court, or in the Chambers of any Judge or Master, and not being otherwise contentious business, and may revoke or alter any such order.

Rule 2 (c.) of the Irish Order provides:—"In respect of business not hereinbefore provided for, the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not in fact completed, and, in respect of other deeds or documents, including settlements, and of all other business, the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system, as altered by Schedule II. hereto."

Schedule II. provides:—"In ordinary cases, as to drawing, &c., the allowance shall be—For drawing, 2s. per folio." In my opinion, that charge of 2s. for drawing does not refer to the preparation of instructions for drawing. Those had been already provided for by the preceding words: "Such fees for instruction as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be reasonable." The Schedule proceeds: "Where draft exceeds 100 folios, 1s. per folio only to be allowed for the excess; for engrossing, 8d. per folio; for fair copying, 4d. per folio; for perusing, 1s. per folio. When document exceeds 100 folios, 6d. per folio only to be allowed for the excess."

In my opinion, these charges refer to drawing and perusing deeds, wills, and other documents of a similar kind, such as articles, marriage settlements, agreements, powers of attorney; but do not refer to the preparation of cases for counsel, or to statements prepared for the information of the client, showing the existing investments of trust funds. These are not conveyancing business at all, and are not *ejusdem generis* with deeds or wills.

As to the third document before me, I for a moment entertained some slight doubt. It is in the form of letters of direction to the trustees to alter the investment of the trust funds, and is, to that

extent, a document intended to be acted upon as an operative instrument. It is right that such directions should be in writing, and I believe they are required to be in writing by Mr. Barry's settlement. But they are not conveyancing business; they require no particular legal form, and might be given by a letter. In no sense are they analogous to a deed or will.

M. R.
1887.

None of the cases to which I was referred by Mr. Bewley—*Stanford v. Roberts* (1), *Re Parker* (2), and *Re Merchant Taylors' Co.* (3)—touch the present question, and, in my opinion, Schedule II. does not apply.

Ante, p. 248.
Ante, p. 273.
Ante, p. 294.

The Taxing Master was therefore right, and the appeal must be dismissed.

Solicitor for the applicant: *Mr. John O'Hagan.*

In re ROBERTSON.

Q. B. D.
1887.

(*By permission*, from 19 *Q. B. D.* 1; s. c. 35 *W. R.* 853, 56 *L. T.* 859.)

March 15.

Solicitor and Client—Costs—Non-contentious Business—Advances on Security of Real Property—Perusing Title-Deeds—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order of August, 1882, Schedule II.

A solicitor making advances to a client upon the security of real property, and perusing for that purpose the title-deeds of such property, is not entitled to charge at the rate of 1s. per folio "for perusing" under the 2nd Schedule of the General Order of August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44).

APPEAL from the decision of a judge at chambers reversing the Master's taxation of a bill of costs.

It appeared that one Sparks instructed Mr. C. H. de G. Robertson, a solicitor, to obtain a mortgage for £1,200 upon certain real property. Pending the completion of the transaction Robertson made advances on the security of the property to be mortgaged. The mortgage having being executed, Robertson delivered a bill of costs containing several items for perusing title-deeds and other documents, the charges being at the rate

Q. B. D.
1887.

of 1s. per folio. On taxation the Master allowed 4d. per folio in respect of the perusal of these documents as instructions for drawing the abstract of title. Robertson having applied for a review of taxation, Huddleston, B., ordered the taxation to be reviewed upon the basis of allowing 1s. per folio for the perusal.

A. J. David, for the appellant :—

Ante, p. 273.

The solicitor claims to charge at the rate of 1s. per folio under the 2nd Schedule of the General Order of 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44); but it is submitted that the charge there allowed "for perusing" does not include the perusal of every document which a solicitor in the ordinary course of his business from day to day has to read. The high charge of 1s. per folio shows that the framers of the Order contemplated a service requiring skill and involving responsibility, and it must be taken that the words are confined to the perusal of new and original documents drawn by the solicitor on one side and perused before execution by the solicitor on the other side. The words "drawing," "engrossing," "fair copy," and "perusing," in fact, apply to the same documents. In *In re R. A. Parker and Others* (1) Chitty, J., decided that abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is fixed by the General Order at 1s. per folio; and it would be absurd that a charge which is not allowed for perusing an abstract of title should be allowed for the perusal of the original title-deeds of much greater length.

Ante, p. 319.

In the Irish case of *In re River Bann Navigation Act*, 1879, *Ex parte Olpherts* (2), it was held that the words "drawing and perusing" (the Irish General Order being substantially the same as the English) applied to the same document, and that the fee of 1s. per folio for perusing deeds did not apply to any other conveyancing matter.

Lambert, for the respondent :—

Ante, p. 273.

In re Parker and Others (3) is not in point. In that case the charge was for perusal of an abstract of title, and the 2nd Schedule contains a special heading dealing with abstracts of title. The

(1) 29 Ch. D. 199.

(2) 17 L. Rep. Ir. 163.

(3) 29 Ch. D. 199.

question there raised was whether the term "other documents" included abstracts of title, and the judgment of Chitty, J., turned entirely on this point. In this case the documents perused come within the heading "perusing deeds, wills, and other documents," and, therefore, on the plain wording of the Order a charge of 1s. per folio is allowed for their perusal.

David, in reply.

DAY, J.:—

I think this appeal must be allowed. It appears that the respondent was solicitor for a client who was desirous of mortgaging property, and that he made advances to his client on the property eventually mortgaged. On the occasion of making those advances he looked at documents constituting his client's title, and perused, among other documents, a will and policies of insurance upon the life of the client. Eventually the mortgage was executed to the mortgagee, and a bill of costs was then sent in by the respondent to his client containing charges for perusing documents I have mentioned at the rate of 1s. per folio. If I understand the practice of the Courts previous to the passing of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), that is not the rate which would have been allowed previous to that Act. Is, then, the solicitor entitled to make the charge under that Act? The 1st section provides for the making of a General Order for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing. In pursuance of this section a General Order was made in August, 1882, the material part of which is as follows:—

"SCHEDULE II.

"Instructions for and drawing and perusing deeds, wills, and other documents.

"Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable.

Q. B. D.
1887.

“In ordinary cases, as to drawing, &c., the allowance shall be—

“For drawing	-	-	-	2s.	per folio.
“ „ engrossing	-	-	-	8d.	„
“ „ fair copying	-	-	-	4d.	„
“ „ perusing	-	-	-	1s.	„ ”

If it was the intention of those who made this Order that the charge of 1s. allowed “for perusing” should be allowed for a mere perusal of documents of title, such as has taken place in this case, it seems to me that the charge might, with much greater justice, be made for perusing abstracts of title. But in the case of *In re* *Ante*, p. 273. *R. A. Parker and Others* (1) Chitty, J., decided that abstracts of title are not within the operation of that part of the Order which I have read; but that the old scale of 6s. 8d. for perusal of every three brief-sheets of eight folios each remains unaltered. It is argued that this is not a case of the perusal of an abstract of title; but I cannot see why a solicitor should be allowed 1s. a folio for perusing a will and policies of insurance, containing, as they do, very voluminous conditions, when he is not allowed to make that charge for perusing abstracts of the same documents. Very little care and labour are required in perusing a will for the purpose for which these papers were perused in the present case. If the object is merely to ascertain whether a person is entitled to a legacy all that is necessary is to skim through the document to see that there is nothing inconsistent with such legacy; and it is idle to say that a charge of 1s. per folio is a fair and reasonable charge for the skill and labour required. In the same way in a policy of insurance there are a number of conditions which are common to all such documents. The Order we have to construe, as I read it, says—“in ordinary cases, as to drawing, &c.”—that is, as to drawing and that which follows drawing—“the allowance shall be, for drawing 2s. per folio; for engrossing”—that is, as I read it, for engrossing the document which has been drawn—“8d. per folio; for fair copying”—that is, for fair copying that document—“4d. per folio.” So far the interpretation is, I think, plain; but then it is said that the words “for perusing” mean “for perusing other documents.” I do not so read the Order. I

(1) 29 Ch. D. 199.

construe the words as meaning "for perusing that document." What has the solicitor, instructed by the other party concerned in the business, to do? He has to read the document which has been drawn and fair-copied in a very different way from that in which it is usually necessary to peruse documents of title. He has to examine it with the most watchful care and anxiety in order to see that there is in it no provision inimical to the interests of his client, and for this service he is very properly allowed to make a charge of 1*s.* per folio. I think that the Master was quite right in refusing to allow it upon the taxation of the costs.

WILLS, J.:—

I am of the same opinion, and entirely agree with my brother Day. To allow a charge of 1*s.* per folio for every perusal of documents which becomes necessary in the course of a solicitor's business would be, in my opinion, unreasonable. It is a matter of considerable consequence, and it is desirable that there should be uniformity of practice with respect to it. If I thought that the decision at which we have arrived was inconsistent with the decision of Chitty, J., in *In re Parker and Others* (1), I should have desired a *Ante*, p. 273. further opportunity of considering the matter and of consulting the Chancery Judges; but I do not think that the view we take is in any way inconsistent with the decision of the learned Judge in that case, that the words "other documents" in this Order do not include abstracts of title. Moreover, it is undesirable that there should be one rule with respect to this matter in England and another in Ireland; and I find that in the case of *Re River Bann Navigation Act, 1879, Ex parte Olpherts* (2), the Irish Courts *Ante*, p. 319. took exactly the same view, holding that, under an order to tax the costs awarded to the owner of lands compulsorily taken by a company, his solicitor is not entitled to 1*s.* per folio for perusing deeds referred to in the abstract of title furnished. The General Order, pursuant to the Solicitors' Remuneration Act, 1881, discussed in that case is substantially the same as that which we are now discussing, and the Master of the Rolls said, with reference to it—"The contention on the part of the solicitor for the vendor, the tenant for life, is that the 2nd Schedule includes the reading

(1) 29 Ch. D. 199.

(2) 17 L. Rep. Ir. 168.

Q. B. D.
1887.

of all deeds, no matter how numerous, relating to the matter in hand. The contention on the other side is, that the 2nd Schedule does not apply to the mere perusal of an old deed, but simply to the case of perusing and approving a new deed or draft deed, the perusal of which requires professional skill or advice, and that it was for that that remuneration was given by Schedule 2 ;" and at a later period of his judgment—"In my opinion the context plainly shows that in that Schedule "the drawing and perusing" were intended to apply to the same document, and that the fee of 1s. for perusing deeds does not apply at all to any other conveyancing matter, the remuneration for which was to be regulated according to the present system." The extravagant consequence that would have resulted in that case from a contrary decision—allowing a charge of 1s. per folio—would have been that the solicitor would have received £19 15s. for perusing a marriage settlement and a mortgage deed, and the learned Judge very pointedly remarks—"If that charge be valid and legal it discloses a very unsatisfactory state of the law, and it is more than questionable whether it ought to be permitted to remain so. For a fee of two or three guineas the services of a competent barrister would be obtained, not for perusing the two deeds only, but for advising on their construction, and, I incline to think, also drafting a further deed, if necessary." By applying the words to documents drawn by an opponent it is possible to give them a reasonable and a natural construction. In perusing such documents the task of a solicitor is highly responsible, and there is a possibility, if he does not exercise his utmost vigilance, that he may be led to overlook some provision injurious to his client's interest ; but there is nothing in the circumstances under which the Solicitors' Remuneration Act, 1881, was drawn to suggest that the framers of the General Order meant that there should be a charge of 1s. per folio for the perusal of documents of every description. In my judgment, therefore, the order of the Judge must, so far as this point is concerned, be set aside, and the order of the Master restored.

Appeal allowed.

Solicitor for appellant: *E. P. James.*

Solicitor for respondent: *C. H. de Grey Robertson.*

TISDALL v. RICHARDSON.

(1886—E. No. 264.)

Exchequer.
1887.

April 18.

(By permission, from 20 L. R. Ir. 199).

(Before PALLES, C.B.)

Practice—Taxation of Costs—Fees to Counsel on Settlement of Writ of Summons and Joinder of Issue.

The Taxing Officer has discretionary power to allow, as between party and party, fees to counsel on (a) settlement of writ of summons, (b) settlement of reply, though the latter is simply a joinder of issue on the preceding pleading.

SUMMONS by the defendant to review the taxation of bill of costs between party and party.

The action was brought, and the writ endorsed, to recover the sum of £200 for money had and received, money lent, and money found to be due on accounts stated, and damages for fraudulent misrepresentation. The statement of claim followed the writ, and defendant filed his defence, whereby he traversed the several allegations in the plaintiff's statement of claim, and also pleaded certain special defences.

The plaintiff filed his reply, simply joining issue on the defence. The action was tried in the Trinity Sittings, 1886, before Baron Dowse, and a jury; and the pleadings having been amended by confining the plaintiff's case to one cause of action, namely, fraudulent misrepresentation, the jury found a verdict for the plaintiff for £200. On the application of the plaintiff judgment was entered for him, but execution was respite on lodgment of the £200 in Court, within fourteen days, which was done.

The defendant subsequently obtained a conditional order to set aside the verdict and judgment; but on cause shown by the plaintiff, the conditional order was discharged with costs. Notice of appeal was served by the plaintiff, but was subsequently withdrawn.

The plaintiff duly lodged his bill of costs for taxation, and the Taxing Master taxed them and certified the amount. The defendant now applied on summons to review the taxing in respect of

Exchequer.
1887.

certain items allowed by the Taxing Master, and sought that these items should be disallowed.

Amongst the items objected to were the following:—

	£	s.	d.
3. Instructions for counsel to prepare writ of summons - - - - -	0	13	4
4. Attending counsel therewith - - -	0	3	4
5. Paid him fee - - - - -	1	1	0
70. Instructions for counsel to prepare joinder of issue - - - - -	0	6	8
71. Attending him therewith - - - -	0	3	4
72. Paid him fee - - - - -	1	1	0

Blood, for the defendant in support of the summons.

P. A. O'C. White, for the plaintiff, contra:—

Ante, p. 343.

3, 4, and 5 are proper items to be allowed plaintiff. They have been allowed in this Division, in *M'Namara v. Malone* (1). True, that was an action of ejectment, which is regulated by the General Orders of 1854; but the principle on which the decision in that case proceeded was not limited, on this point, to cases of ejectment. These items are within Order X., Rule 12, of April, 1878. A writ is a proceeding. By section 3 of Judicature Act, "action" is defined as "a proceeding" commenced by writ.

As to items 70, 71, and 72, counsel's fee should be allowed in any case where a fee to counsel would have been allowed for settling issues under the Common Law Procedure Act, 1853 and 1856. Such a fee would not have been allowed in a simple action for goods sold and a traverse, but, in this action, there were seven counts in the statement of claim, and twenty-four paragraphs in the defence, many of them being of a very special nature, which could not be dealt with except upon the advice of counsel.

The LORD CHIEF BARON held that the Taxing Officer was right in allowing the items 3-5 and 70-72.

Solicitor for the plaintiff: *G. Byrne*.

Solicitor for the defendant: *H. F. Leachman*.

M'SHEFFREY v. LANAGAN.

(By permission, from 20 L. R. Ir. 528).

Appeal.
1887.

April 18.
August 2.

(Before LORD ASHBOURNE, C., and FITZGIBBON and
BARRY, L.JJ.)

Slander—Nominal Damages brought into Court and accepted—Costs—Taxation—General Order XXX., R. 4—Judicature Act, s. 53—Common Law Procedure Act, 1853, s. 126—Practice.

The defendant in an action of slander paid 6*d.* into Court, and the plaintiff accepted it in full satisfaction of his claim. The Taxing Master refused to tax the plaintiff's costs, upon the ground that the plaintiff was only entitled to 6*d.* costs, and the Queen's Bench Division affirmed his ruling:—

Held, by the Court of Appeal (Lord Ashbourne, C., and FitzGibbon and Barry, L.JJ.) that the plaintiff was entitled to tax his costs necessarily and properly incurred in the action.

Query, however, whether the Court had not jurisdiction, under s. 53 of the Judicature Act, in such a case, to deprive the plaintiff of the costs on a proper case being made for such exercise of direction.

APPEAL from an Order of the Queen's Bench Division of the 11th February, 1887.

The action was brought for damages for alleged slander. The defendant paid into Court sixpence, which the plaintiff accepted in full discharge of the cause of action. The case came on before the Taxing Master for taxation of the plaintiff's costs, and the Taxing Master decided that, as the plaintiff had only recovered sixpence damages he was only entitled to sixpence costs. The plaintiff thereupon took out a summons to review the taxation, or for an order declaring the plaintiff entitled to all costs properly and necessarily incurred in the action, when taxed and ascertained, and directing the Taxing Officer to tax the same. The Queen's Bench Division refused this application, and from this refusal the present appeal was brought.

J. O. Wylie, for the appellant:—

Under Order XXX., Rule 4, the plaintiff is entitled, if he accepts the sum paid in in satisfaction of the entire cause of action, to tax his

Appeal.
1887.

costs, and in case of non-payment within forty-eight hours, to sign judgment for the costs so taxed. The Judicature Act, section 53, provides that, subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by inference to the amount recovered therein, the costs shall follow the event. The only statute affecting the costs payable in an action of slander is section 126 of the Common Law Procedure Act, 1853, which provides that in all actions for slander, if the jury shall find the damages to be under the value of forty shillings, the plaintiff shall not recover more costs than damages. This, however, only applied to cases where there was a verdict of the jury: *Wigens v. Cook* (1); *Frean v. Sargent* (2); *Griffith v. Thomas* (3); decided on the corresponding English statute. Section 243 of the Common Law Procedure Act, 1853, does not apply to actions of slander. The proviso as to actions of libel in section 53 of the Judicature Act only is "where the *jury* shall give damages under forty shillings." There being, therefore, no statute to deprive the plaintiffs of the costs, they are entitled to full costs, and the Taxing Master was wrong in refusing to tax them.

D. Henry, for the defendant:—

This case is within the spirit and intention of section 126 of the Common Law Procedure Act, 1853, and the intention of statutes should be considered: *Ex parte Greenwood* (4). Order XXX., Rule 4, only means that where the plaintiff is otherwise entitled to costs the Taxing Master is to tax the costs. The statutes regulating the costs payable by reference to the amount recovered therein apply, whether there was a trial or not: *Lapsley v. Blee* (5).

Ante, p. 200.

Aug. 2. LORD ASHBOURNE, C.:—

In this case the action was for slander, and the plaintiff claimed £500 damages. The defendant paid into Court the sum of sixpence, which the plaintiff accepted in full discharge. The case came before the Taxing Officer (Mr. Robinson), who decided that the plaintiff, having only recovered sixpence damages was only entitled to sixpence costs.

(1) 6 C. B. (N. S.) 784.

(2) 2 H. & C. 293.

(3) 4 D. & L. 109.

(4) 27 L. J. Q. B. 28.

(5) 6 L. R. Ir. 155; 13 Ir. L. T. R. 174.

The Queen's Bench Division affirmed the decision of the Taxing Officer, and the question has come before us on appeal.

The plaintiff admits that if by a verdict of a jury he had been awarded a sum of sixpence damages, he would only have been entitled to a like sum of costs, but contends that inasmuch as the defendant lodged said amount in Court (there being no finding of a jury), the plaintiff is entitled to full costs.

Section 53 of the Irish Judicature Act, 1877, deals with costs "subject to all existing enactments, limiting, regulating, or affecting the costs payable in any action, by reference to the amount recovered therein."

One of these existing enactments was the Common Law Procedure Act, 1853, section 126, which provides that in actions for slander, "in case the jury shall find the damages to be under forty shillings," the plaintiff shall not recover more costs than damages.

The plaintiff and appellant contended, that having due regard to these sections, under Order XXX., Rule 4, he was entitled to full costs. The costs here depend on the construction of that Rule, for the sixpence damages were not awarded by the verdict of a jury, and are, therefore, not within section 126 of the Common Law Procedure Act, 1853. [His Lordship read the Rule.] That Rule is not confined to slander, but deals with all actions, and any decision on its application would have a far-reaching effect. In my opinion it applies to and governs this case. The plaintiff has accepted the amount lodged in satisfaction of the cause of this action in respect of which it was paid in, and should, therefore, be at liberty to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed. I, therefore, think that the Taxing Officer should have taxed the costs as asked, and that the order of the Queen's Bench Division, upholding his ruling, should be reversed.

I do not myself think this a very satisfactory result, and I am disposed to think that the frame of Order XXX., Rule 4, might possibly be reconsidered, with a view to seeing if costs in actions like the present could not be dealt with in another way. As this question so much affected the Common Law Divisions, we thought it right to communicate with the Lord Chief Justice and the Lord Chief Baron. The Lord Chief Baron concurs in the conclusion

Appeal.
1887.

which I have announced, but the Lord Chief Justice thinks the Queen's Bench Division right, and that if this Court differs from it that Rule 4 shall be reconsidered. The result will be that the appeal will be allowed.

FitzGIBBON, L.J.:—

This case comes before us upon the refusal of the Taxing Officer to tax the costs at all; and it seems to me that if he was bound under the Act and Rules to enter upon any taxation, it will follow that the plaintiff is entitled to succeed on his summons, which seeks in the alternative “an order declaring the plaintiffs entitled to all costs properly and necessarily incurred in this action when taxed and ascertained, and directing the Taxing Officer to tax same.”

Under the Judicature Act, section 53, “subject to the provisions of the Act and Rules the costs of and incident to every proceeding . . . shall be in the discretion of the Court—provided that (subject to all existing enactments regulating the costs payable in any action, by reference to the amount recoverable therein) the costs of every action, question, and issue tried by a jury shall follow the event, unless, upon application made, the Judge at the trial or the Court shall for special cause shown and mentioned in the order otherwise direct,” &c.

The decisions upon the analogous English statutes, of which *Wigens v. Cook* (1) is an example, establish that the statutes regulating the costs by reference to the amount recovered do not apply, as the action never reached the stage at which the existing enactments on the subject might have come into operation. All these enactments, according to their terms, limit the costs only upon verdict after trial. It is further to be observed that one of these provisions is to be found in this very section—“Provided also that in all actions for libel *where the jury shall give damages* under forty shillings the plaintiff shall not be entitled to more costs than damages.” It follows that the costs in question are costs which are “within the discretion of the Court,” unless they are subject to some provision of the Judicature Act, or of the Rules made under it, and thus the right to them depends altogether upon the construction of that Act and of the existing Rules. The question whether the

Court has discretion as to these costs has never been raised; no materials for guiding the exercise of such discretion has been given, and the defendant has rested his case entirely upon Order XXX., and the Rules included in it. The refusal of the Taxing Officer to tax the costs, and the decision in the Court below have also proceeded on the same ground.

Schedule Rule 30 provides that "*any* defendant may, at any time before or at any time of delivering his defence, or by leave at any later time, pay into Court money by way of amends." Order XXX., Rule 4, then enables the plaintiff before reply to accept money so paid in, in which case, on giving notice to the defendant, he "*shall be at liberty*, in case the sum paid in is accepted in satisfaction of the entire cause of action, to *tax his costs*, and *in case of non-payment within forty-eight hours to sign judgment for his costs so taxed*."

Really the contention of the defendant here is, that in a case coming within the very terms of the Rule, the Rule has no effect, and means that the plaintiff may tax nothing, and in case of non-payment, may sign judgment for nothing. He is entitled to go before the Taxing Officer, but only to be told that he is to have no costs. I think such a construction would turn the Rule into a trap for the plaintiff. It not merely entitles him to tax the costs, but, in the case of non-payment of them, it entitles him to sign judgment for the costs so taxed. How can there be non-payment of no costs, or a signing of judgment for costs taxed to nothing? I think the fair construction of the Rule is that, in every case coming within it, the plaintiff shall be entitled to some costs. The question still is, how much? And there is no existing enactment or rule limiting the amount. The term "costs," and not "full costs," has been consistently used from the time of the Statute of Gloucester until now in Acts, Rules, judgments, and other legal documents, under which "costs of suit" are payable in full, and I cannot narrow the meaning of "costs," for the first time, in this Rule. Whether the Statute of Gloucester has been repealed or not seems to me to be wholly immaterial, because, if it be, the Judicature Act and Rule are substituted for it, and give the plaintiff his "costs."

It is to be observed that the decision appealed from would give a different meaning to the term "costs" in different events, and would impute to the Rule the meaning that whether there are any costs to

Appeal.
1887.

be taxed or not is to depend upon the amount paid into Court. I cannot read it in that way; and, so long as this Rule stands, I must hold the plaintiff entitled to the costs which it purports to give him.

I should like to say for myself, that if the propriety of the Rule is to be reconsidered, it appears to me that a great deal may be said in its favour, and against indiscriminately depriving the plaintiff of his costs in every case where a defendant lodges a small sum in Court by way of amends. There may be actions of defamation in which the character of the plaintiff would be vindicated by nominal damages, though the action itself was far from frivolous. If, in the case of a libel, the defendant were permitted to lodge a small sum by way of amends, without liability to costs, the plaintiff would be met by the dilemma, that if he drew it out in full satisfaction, he had not recovered more than 40*s.*, and therefore must pay his own costs; or, if he went to trial, probably at great expense, he would be charged with having done so, not on the issue of his character, for the vindication of which he had properly brought the action, but on the mercenary issue, whether the amount lodged was sufficient. In the case of newspapers an apology, with lodgment of amends, entitles the plaintiff to his costs, and I do not see why a private libeller who withdraws his charge should not be in the same position. Even at the trial, after all the expense has been incurred, there is no more common or proper termination of an action for defamation than a withdrawal of the charge, the defendant paying costs and apologising; and I cannot see why a rule of Court which enables him to do so at an earlier stage is to be treated as manifestly absurd. For the present, however, we have only to say that upon the true construction of Order XXX., Rule 4, the plaintiff in this case was entitled to tax his costs properly and necessarily incurred in the action.

BARRY, L.J.:—

I concur in the decision arrived at, and for the reasons given by Lord Chancellor and Lord Justice FitzGibbon, and I do not say anything more, except that I pronounce no opinion as to whether, under the section of the Judicature Act, the Queen's Bench Division might not, on a proper proceeding being instituted for the purpose, having deprived the plaintiff of his costs in this case—that

is, exercised their discretion over the costs. But no such order was obtained, no such order was applied for, no such argument was advanced here; for I asked whether the respondent's counsel contended that the order of the Queen's Bench Division amounted to an order exercising their discretion and depriving the plaintiff of the costs, and this was not contended for.

I agree that the order appealed from was wrong, and must be reversed.

Appeal.
1887.

Solicitors for the plaintiff: *O'Doherty & Tolund.*

Solicitor for the defendant: *P. Gallagher.*

Re THE BRIDEWELL HOSPITAL AND THE METROPOLITAN BOARD OF WORKS.

Chitty, J.
1887.

June 27.

(*By permission, from 57 L. T. 155.*)

(Before CHITTY, J.)

Solicitor—Costs—Election to be paid under old system—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), c. 6.

Where money is paid into Court under statutes incorporating s. 80 of the Lands Clauses Consolidation Act, 1845, the solicitor for the vendor may entitle himself to detailed charges, provided that he signifies his election "before undertaking the business."

A sum of money was paid into Court by the Metropolitan Board of Works for lands belonging to the governors of a certain hospital. The hospital proposed to purchase certain ground rents out of the fund in Court, and instructed their solicitor accordingly. The solicitor wrote saying that he elected that his remuneration for all business connected with the purchase should be in accordance with the system in force previously to the coming into operation of the Solicitors' Remuneration Act, 1881, as altered by schedule II. of the General Order made under that Act, and he requested the clerk of the hospital to inform the solicitor of the Board of his intention. The solicitor of the Board replied by saying that they required that the remuneration should be according to schedule I. to the General Order under the Solicitors' Remuneration Act, 1881. The Court approved of the proposed investment, and made an order that the Board should pay to the Governors of the hospital their costs, including all reasonable charges and expenses incident thereto of the reinvestment of the amount payable under the agreement for purchase and of obtaining the order, and all proceedings relating thereto,

Chitty, J.
1887.

with such costs, charges, and expenses to be taxed in case the parties differed. On delivering the bill the solicitor had charged in detail for the conveyancing business. The Taxing Master upon taxation decided that the election made by the solicitor was binding on the Board, and allowed the detailed charges. The Board carried in objections, which the Taxing Master overruled. The Board then took out a summons to review the taxation, and raised the question, whether upon a reinvestment in land of purchase-money paid into Court by promoters under the Lands Clauses Consolidation Act, 1845, the solicitor for the landowners obtaining the reinvestment could, as against the promoters, elect to be paid otherwise than according to the scale in Schedule I., Part I. of the General Order made pursuant to the Solicitors' Remuneration Act, 1881.

Held, that there was no ground for introducing any exception into rule 6 of the kind contended for by the Board.

THIS was an adjourned summons to review a taxation of costs.

The question to be determined was whether, upon a reinvestment in land of purchase-money paid into Court by promoters under the Lands Clauses Consolidation Act, 1845, the solicitor for the landowners obtaining the reinvestment could as against the promoters elect to be paid otherwise than according to the scale in Schedule I., Part I. of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.

The circumstances of the case were as follows:—At the date of the order hereinafter mentioned, the sum of £11,074 5s. 3d. Consols, representing purchase-money paid into Court by the Metropolitan Board of Works for lands belonging to the Governors of Bridewell Hospital, was standing in Court to the leger credit, "*Ex parte* The Metropolitan Board of Works; in the matter of the Metropolis Improvement Act, 1863, in the matter of the Estate of Bridewell Hospital," respecting purchase-moneys for hereditaments purchased by the Board from the Governors for the purposes of the improvements authorised by the Metropolis Improvement Act, 1863.

On the 18th December, 1885, the clerk of the Governors wrote to the solicitor of the Board, saying that the Governors were proposing to purchase from W. A. T. Amherst certain ground rents at Hackney, the purchase-money (£6,200) for which would be paid out of a fund in Court standing to the credit of the Board, the account of the hospital, and that on sending instructions to the Governors' solicitor to act for the hospital in the matter the solicitor had written to the clerk a letter, dated the 10th December, 1885,

a copy of which letter the clerk forwarded to the solicitor of the Board.

Chitty, J.
1887.

The solicitor of the Governors in his letter of the 10th December, 1885, said, referring to the instructions to him to represent the Governors on the purchase by them from W. A. T. Amherst of the ground rents, that he elected that his remuneration for all business connected therewith should be according to the system in force previously to the coming into operation of the Solicitors' Remuneration Act, 1881, as altered by Schedule II. to the General Order made under that Act. He added that, as the purchase-money would be raised by a sale of a portion of the funds then in Court to the credit of the Metropolitan Board of Works, the account of Bridewell Hospital, being compensation money paid into Court under the Lands Clauses Consolidation Act, 1845, the costs of the intended purchase would be payable by the Metropolitan Board of Works, and he requested that their solicitor should be informed of the object of this letter.

On the 22nd December, 1885, the solicitor of the Board replied to the clerk of the Governors (referring to his letter of the 18th December enclosing a copy letter from the solicitor of the Governors signifying his election that his remuneration for all business connected with the proposed re-investment in land of the sum of £6,200 belonging to the Governors should be according to the system in force previously to the coming into operation of the Solicitors' Remuneration Act, 1881, as altered by Schedule II. to the General Order under that Act), and stated that, in his opinion, it was not competent for the solicitor of the Governors as against the Board to make such election, and that he should so contend before the Taxing Master. He also said that the Board required that the remuneration should be according to Schedule I. to the General Order under the above-mentioned Act.

Application was duly made to the Court for approval of the proposed investment, and on the 3rd June, 1886, Chitty, J., made an order for sale of part of the above-mentioned Consols sufficient to produce £6,200, and for investment of that sum in the purchase by the Governors of freehold hereditaments at Hackney, part of the estate of W. A. T. Amherst, and the order directed that the Board should pay to the Governors their costs (including therein all

Chitty, J.
1887.

reasonable charges and expenses incident thereto of the re-investment of the amount payable under the agreement for purchase in the purchase of the hereditaments therein comprised, and of obtaining this order and of all proceedings relating thereto), such costs, charges, and expenses to be taxed and settled by the Taxing Master in case the parties differed.

The investment having been completed, the firm of solicitors of the Governors delivered their bill of costs, charging in detail for the conveyancing business.

Upon taxation the Board contended that the scale fee and not detailed charges were payable, but the Taxing Master decided that the election made by the solicitor of the Governors of the 10th December, 1885, in his letter was binding upon the Board, and allowed the detailed charges.

Objections to the taxation were carried in on behalf of the Board as follows:—

The scale fee in Schedule I., Part I., of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881 (and not detailed charges) should have been charged and allowed for in respect of the conveyancing costs in the bill which related to a re-investment in land under the Lands Clauses Consolidation Act, 1845; that clause 6 of the General Order was not applicable to an investment in land under the Lands Clauses Consolidation Act, 1845; and that the option given by clause 6 as between a solicitor and his client was not available as against a third party.

The answers given by the Taxing Master were as follows:—

In this case notice in accordance with rule 6 of the Remuneration Order was duly given by the solicitor to his client, the vendors, who through their treasurer forwarded the same to the purchasers, the Board of Works.

The solicitor to the Board thereupon gave notice to the vendors that it was not competent for the solicitor to make such an election as against the purchasers, who would object to pay the costs except under Schedule I. of the Remuneration Order.

The obligation to pay costs in this case is a statutory obligation out of which the purchasers had no power to contract themselves, but they did all they could do under the circumstances by giving the notice above referred to.

This may possibly distinguish the case from existing decisions. If not, that scale which is most remunerative to the solicitor, and most onerous on the party liable to pay, will always be applied where the statutory obligation exists.

Chitty, J.
1887.

Notwithstanding the considerations I have suggested, as the judgment in (*a*) *Hester v. Hester* (1) lays it down without qualification that, where notice of election has been properly given to the client, it is binding on those who have to pay the costs. I do not feel at liberty to allow these objections, which I accordingly overrule. *Ante*, p. 360.

A summons was thereupon taken out, on the part of the Board, asking that the Taxing Master might be directed to review the bill of costs taxed by him, and to allow the objections made by the Board to such taxation.

The summons was adjourned into Court, and now came on to be heard.

Romer, Q.C., and *Pownall*, for the Metropolitan Board of Works, in support of the summons, referred to

Solicitors' Remuneration Act, 1881; *Re The Merchants Taylors' Company* (2); *Hester v. Hester* (3). *Ante*, p. 237.
Ante, p. 294.
Ante, p. 360.

Yate Lee, for the Governors of Bridewell Hospital *contra*.

CHITTY, J.:—

I see no sufficient ground for introducing any exception of the kind contended for by the Metropolitan Board of Works in the present case. Rule 6 of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, provides that:—"In all cases to which the scale prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to his client"—communicated to whom? To his client—"Elect that his remuneration shall be according to the present system as altered by Schedule II. hereto." In that way, of course, the scale would be excluded. The Board no doubt have failed to pay these costs. The Board, however, are

(1) 55 L. T. Rep. N. S., 669; W. N., 1886, p. 208.

(2) 52 L. T. Rep. N. S., 775; 29 Ch. Div., 209; 30 Ib., 28.

(3) 55 L. T. Rep. N. S., 669, 862; 34 Ch. Div., 607.

Chitty, J.
1887.

not in the position of the client. It is clear that they cannot dictate to the client what solicitor he shall employ; and no doubt the result is, that those who have to pay do not get the opportunity of dissenting from the election of the solicitor. To take a common case: the solicitor, before undertaking the business, elects that his remuneration shall be according to the old system. Thereupon the client may say, "I will go to another solicitor." Of course, in circumstances like the present the matter would be indifferent to the client, whether he paid the higher or lower sum. But still the 6th rule has given the option to the solicitor. It is not in reality so unfair as it seems to have appeared to the Board's advisers, because, after all, the solicitor who looks into the work beforehand, or makes some objection as to the amount of work that is to be done, only claims to be paid according to the old system instead of being paid according to the new. He cannot get paid too much, because I understand that the Taxing Master moderates the amount of his charges. The Board gets the benefit of the Taxing Master's independent opinion. And while the experienced solicitor may object to accept less than he would be paid under the old system, he may, however, find that he has got a less sum than the scale would have given. I see, therefore, no ground for introducing an exception to a rule which is so plainly expressed as the 6th rule of the General Order. The result is, that I uphold what the Taxing Master has done, and dismiss this summons with costs.

Solicitor for the Metropolitan Board of Works: *Reginald Ward.*
Solicitors for the Governors of Bridewell Hospital: *Still & Son.*

BLAIR AND ANOTHER v. CORDNER.

Q. B. D.
1887.

(By permission, from 19 Q. B. D. 516; s. c. 36 W. R. 109.)

July 25.

(Before Lord ESHER, M.R., LINDLEY, and LOPES, L.JJ., sitting
as a Divisional Court.)

Solicitor—Bill of Costs—Interest on Disbursements and Costs—Demand from Client—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5, General Order VII.

By General Order VII. under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5 the interest which a solicitor is entitled to recover under the Order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation—and it is provided that a solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client.

A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill :—

Held, that the solicitor was entitled to such interest.

APPEAL from the City of London Court. The plaintiffs, a firm of solicitors, sued the defendant for £1 1s. 2d., being interest at the rate of 4 per cent. per annum, commencing one month after the delivery to the defendant of the plaintiffs' bill of costs and disbursements, upon £89 13s. 10d., the amount of such bill of costs and disbursements which was allowed on taxation. It appeared that on December 3, 1886, the plaintiffs delivered to the defendant a bill amounting to £133 18s. 3d. At the time of so doing they did not claim interest. The bill was taxed, and on March 30, 1887, the Master certified that £89 13s. 10d. was due, and made an order that the defendant should pay this sum to the plaintiffs within twenty-one days from the date of service of the order. The order was served on March 31, and on April 21 the defendant in compliance therewith paid the plaintiff the sum of £89 13s. 10d. On April 22 the plaintiffs for the first time claimed from the defendant £1 1s. 2d., being interest on £89 13s. 10d. at 4 per cent. from January 3, or one month from December 3, the date of the delivery

Q. B. D.
1887.

of the bill of costs and disbursements, to April 22. The Judge found a verdict for the plaintiffs.

Gould, for the defendant :—

The plaintiffs have no right to interest under General Order VII. Their right depends on a “demand from the client.” This may mean either a demand of the amount of the bill or a specific demand of interest at the statutable rate. Mere delivery of the bill is not a demand, and there was no demand, either of the amount due, or of interest at the statutable rate upon that amount as reduced by taxation, till after payment of the taxed bill.

De Sausmarez, for the plaintiffs :—

The right of the plaintiffs to interest commenced under General Order VII. one month after delivery of their bill. This delivery was a statutable “demand.” The order does not make it necessary to claim interest, and by its terms interest is payable on the true amount of the bill as fixed by taxation. The plaintiffs claimed interest as soon as the amount on which it was payable had been ascertained by taxation under General Order VII., and had become payable under the Master’s order.

LORD Esher, M.R. :—

I am of opinion that this appeal should be dismissed. The question is as to the meaning of General Order VII. It is suggested that to send in a bill is not to demand payment of it, but this is a fanciful view. The words “from demand” mean “from sending in the bill.” From the date of sending in the bill a solicitor becomes entitled under the Order to interest at 4 per cent. on the true amount of the bill as ascertained by taxation. I do not say what might have been the result if the solicitor had postponed claiming interest for an unreasonable time, but here he practically claimed the interest as soon as it had become due, and his title to it is clear.

LINDLEY, L.J. :—

I agree. The true construction of General Order VII. is, in my opinion, that the solicitor is entitled to claim 4 per cent. interest

on the taxed costs at any time before they have been paid. Here in effect when the taxed costs were tendered he claimed interest upon them.

Q. B. D.
1887.

LOPES, L.J., concurred.

Appeal dismissed.

LORD ESHER, M.R., stated that the Court had conferred with the Judges sitting in the other Division of the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), and that they agreed with the decision.

Solicitors for plaintiffs: *Blair & Girling.*

Solicitors for defendant: *Burn & Berridge.*

PALMER v. LOCKE.

(Before MORRIS, C.J.)

Assizes.
1887.

July.

(By permission, from 21 Ir. L. T. R. 32.)

Ejectment for non-payment—Costs of posting.

APPEAL by plaintiff from decision of County Court Judge (Waters, Q.C.,) granting decree in ejectment for non-payment of rent with ordinary costs, but disallowing costs of service by posting. The district was in a disturbed state, and the bailiff who served the processes in ejectment swore he would be afraid to serve them in the ordinary way. The extra costs of posting in the case would be 8s. 6d. The County Court Judge granting the decree directed the Clerk of the Peace not to allow the extra cost of posting.

MORRIS, C.J., affirmed the decree, and directed that the plaintiff should have his extra costs of service by posting, to which he was clearly entitled when such service was necessary.

Solicitor for plaintiff: *W. R. Fenton.*

Solicitor for defendant: *J. B. Powell.*

Stirling, J.
1887.

Nov. 16, 17.

In Re METCALFE.

METCALFE v. BLENCOWE.

(*By permission, from 36 W. R. 137.*)

Solicitor—Bill of Costs—Taxation—Election—Notice—“Undertaking any business”—“Client”—One of several Trustees—General Order under Solicitors’ Remuneration Act, 1881 (44 & 45 Vict., c. 44), rr. 6, 8.

The notice of election under Rule 6 of the General Order under the Solicitors’ Remuneration Act, 1881, as to remuneration for conveyancing business arising in an action, must be given by the solicitor before he undertakes such conveyancing business. After having done any work in the matter which would properly be covered by the scale charge—*e.g.*, discussed with the client the mode of sale and questions relating to the title—it is too late for him to elect.

Ante, p. 348.
Ante, p. 360.

In re Allen, 35 W. R. 218, 34 Ch. D. 433, and *Hester v. Hester*, 35 W. R. 233, 34 Ch. D. 607, followed.

Semble, where a solicitor is acting for several trustees, notice of election must be given to them all.

SUMMONS to review taxation.

The question in this case was as to the validity of a notice of election under Rule 6 of the General Order under the Solicitors’ Remuneration Act, 1881. This depended upon (1) whether the election was made in time; (2) whether the election, being communicated to only one of two trustees, could be supported.

Messrs. Tamplin, Taylor & Joseph acted as solicitors for Mr. Blencowe and Mr. W. C. Metcalfe, who as trustees were defendants in an administration action. In the course of this action it became necessary to raise a sum of money for payment of costs. It was at first proposed to do this by way of mortgage; but afterwards it was determined to sell a portion of the estate for the purpose. A summons was taken out in the action, and an order for sale made on the 7th of May, 1886. No steps were taken by the solicitors in the matter of the sale between that date and the 21st of June, 1886, on which day Messrs. Tamplin, Taylor & Joseph communicated their election in writing to Mr. Metcalfe, one of the trustees, in the following terms:—“*Re Metcalfe*, deceased. Referring to the proposed sale of the ‘Metcalfe Arms,’ we beg to inform you and your co-trustee, Mr. Blencowe, that we hereby elect that our

remuneration for such business shall be in accordance with the old system of costs as altered by Schedule II. of the Remuneration Orders." Shortly after the 21st of June, 1886, the sale was proceeded with, and in due course completed. The bill of costs was made out on the footing of the above notice. The Taxing Master disallowed many of the items, on the ground that the remuneration should be according to the scale charge fixed by Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881.

Stirling, J.
1887.

The defendants objected to the disallowance of these items, urging that they were rightly included in the bill, being charges for conveyancing work done as fixed by Schedule II. to the Order, and because, before undertaking the business in respect of which such charges were made, the defendants' solicitors, by writing under their hand, communicated to the client that they elected that their remuneration should be according to Schedule II. of the Order.

The Taxing Master overruled these objections on the ground, *inter alia*, that the notice was given only to one trustee, not to both, and that in his opinion a notice of this description should be given to all the trustees.

The Taxing Master then certified the taxation according to the scale in the General Order, whereupon the defendants took out this summons, asking that their objections to the taxation might be allowed, and for a reference back to the Taxing Master to vary his certificate accurately.

S. Dickinson, for the applicants.

A. W. Rowden, for the plaintiffs, pointed out certain items in the solicitors' bill of costs (which are referred to in the judgment.) (He was stopped by the Court.)

Dickinson replied.

STIRLING, J.—A point has been argued before me which was not brought to the notice of the Taxing Master, and on that point I decide the question. While, therefore, it is on that account unnecessary for me to discuss the reasons advanced by the Taxing

Stirling, J.
1887.

Master for the course which he has taken, I wish it to be understood that I do not disagree with those reasons.

The question in this case is whether the election was made in accordance with Rule 6 of the General Order under the Solicitors' Remuneration Act, 1881. That rule says that—"In all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order."

Now the business in this case was conveyancing business connected with a sale in the course of an administration action for the purpose of paying certain costs. It has been argued by Mr. Dickinson that, the order for sale being made on the 7th of May, 1886, and the notice of election being given on the 21st of June, 1886, and nothing having been done in the matter of the sale in the meantime, the election was in time. But I find in the solicitor's bill of costs an entry, under date the 24th of March, of a charge for preparing the summons for sale; on the 31st of March a charge made for attending the summons, and on the 5th of April a conference is charged for, at which the question was discussed whether the sale should be by public auction or private contract, and the title was considered. In my opinion this case comes within the principles laid down in *In re Allen* (1), and *Hester v. Hester* (2), and it is too late, under the 6th rule of the General Order, for a solicitor to declare his election after holding a conference with the client for the purpose of discussing the mode of sale and the title to the property. Such a conference is properly business covered by the scale charge, and the election referred to in the rule must be, in my judgment, declared before undertaking any such business.

As regards the reasons given by the Taxing Master, one of them raises a question of some importance, as to which it may be well that I should express an opinion. The Taxing Master says that notice to one of two trustees is not sufficient. It is not necessary for me to decide the point; but, as at present advised, I consider

(1) 35 W. R. 218, 34 Ch. D. 433.

(2) 35 W. R. 233, 34 Ch. D. 607.

Ante, p. 348.
Ante, p. 360.

that a solicitor must pursue his right of election under the General Order strictly, and that, as according to the rule notice must be communicated to "the client," and the client in this case consisted of two persons, notice to one of them was not sufficient.

Stirling, J.
1887.

Solicitors: *Tamplin, Taylor & Joseph; Ernest Bevir.*

O'MEARA v. D'ESTERRE AND COX.

(By permission, from 21 L. R. Ir. 135.)

V. C.
1887.
Nov. 29.

Practice—Costs—Taxation as between party and party—Addition to bill after lodgment for taxation—Accidental Omission—Orders and Regulations, 12th December, 1868.

1888.
Feb. 7.

Rule 8 of the Orders and Regulations of the 12th December, 1868, for the conduct of business in the offices of the Taxing Masters of the Court of Chancery in Ireland, applies to costs as between party and party, as well as to those between solicitor and client.

SUMMONS, on behalf of W. S. Cox, one of the defendants, for an order that the Taxing Master, to whom the taxation of the said defendant's costs stood referred, be directed to permit him to amend and alter the bill of costs lodged by him for taxation, by adding thereto the sum of £17 15s. 10d., being the amount of his expenses in attending the trial of the action, or to permit the said defendant to withdraw and cancel the said bill of costs, and to lodge a new one.

The action, which was tried by the Vice-Chancellor on oral evidence, was, on the 11th of February, 1887, dismissed with costs.

The defendant, W. S. Cox, a civil engineer, attended the trial, and was examined thereat. His expenses, &c., were, as appeared by affidavits filed on his behalf, accidentally omitted from the bill of costs lodged.

An objection and requisition was accordingly presented to the Taxing Officer asking for liberty to add the said sum of £17 15s. 10d. to the bill already lodged, or to present a new one; but the Taxing Master, on the 27th July, 1887, declined to do so, on the ground that he was precluded by the 8th Rule of the Orders and

V. C.
1887.

Regulations of the 12th December, 1868, for the conduct of business in the offices of the Taxing Master, from allowing any addition or alteration in costs after lodgment (1).

Mr. T. D. Rearden, in support of the application :—

The principle applicable to cases of taxation between solicitor and client does not apply to cases of taxation between party and party. Sir John Romilly, M.R., in *Davis v. Earl of Dysart* (No. 2) (2), says (at p. 132):—" The bill of costs, as between party and party, is always susceptible of being added to or varied after it has been brought into the office. In this respect it is quite different from a bill of costs taxed under the statute, where an alteration cannot be made as against the client, except with his consent, after the bill has been brought in for taxation. In cases of taxation of costs as between party and party, the bill of costs is analogous to a statement of facts, and is a claim by one party against another party to a suit, and it may be amended in any way and at any time before the taxation is concluded. This has been the invariable practice, as I am informed on inquiry " See also *Morgan and Davey on Costs* (2nd edition); pp. 432, 473. The practice as there laid down has prevailed in this country, and the rule by which the Taxing Master considered himself bound has never in practice been acted on between party and party.

Mr. Robert Robertson for the plaintiffs :—

The General Order deals with this bill of costs in the same way as with one between solicitor and client.

The VICE-CHANCELLOR allowed the matter to stand over for a report from the Taxing Master.

The Taxing Master, by his report, dated the 21st December, 1887, stated that the sum in question formed no part of the costs when lodged; that after the costs were taxed the defendant's solicitor applied to have this sum added to his costs, which application was strongly resisted by the plaintiff's solicitor; and that,

(1) Rule 8. No addition or alteration to be made in costs after they are lodged for taxation.

(2) 21 Beav. 124.

after full discussion, the Taxing Master came to the conclusion that he would not be justified in allowing a claim of the kind, and refused the application on the above ground—that this charge formed no part of the costs when lodged for taxation, and, under Rule 8 of the General Order of the 12th December, 1868, the defendant was bound by the costs so lodged, and was not justified in making this claim, which the Taxing Master considered was altogether an after-thought on his part.

V. C.
1887.

The VICE-CHANCELLOR:—

Having regard to the report of the Taxing Master, and to the General Order referred to, I must hold the applicant bound by the bill of costs originally lodged by him, and make no rule on this application.

1888.
Feb. 7.

Solicitor for the applicant: *Mr. T. H. Kenny.*

Solicitor for the plaintiffs: *Mr. P. S. Connolly.*

Re REES ; REES v. REES.

(*By permission, from 58 L. T. 69.*)

Kay, J.
1887.
Dec. 7,

(Before KAY, J.)

Administration action—Sale of leaseholds—Mortgagee—Costs—Solicitors Re remuneration Act, 1881 (General Order in pursuance of), r. 2 (c); sched. 2.

In an administration action, to which mortgagees of leaseholds were not parties, the plaintiffs obtained an order to sell the leaseholds, and that the money should be paid into Court. The order was made without the knowledge of the mortgagees. The plaintiffs wrote to the mortgagees sending draft particulars and conditions of sale as settled by the conveyancing counsel to the Court “for your perusal.” The mortgagees undertook to concur in the sale on condition that their mortgage debt and costs and expenses were provided for out of the proceeds of sale in Court, and they returned the conditions approved. The Taxing Master disallowed the fees charged at the rate of 1s. a folio for perusing the conditions of sale, but allowed a fee of one guinea for reading them. One of the grounds of disallowance was that conditions of sale were not such documents as were intended by the word “documents” in Schedule 2 of the General Order made in pursuance of the Solicitors Remuneration Act, 1881.

Kay, J.
1887.

On summons to vary the Taxing Master's certificate :

Held, that (while not deciding that conditions of sale did not come within the word "documents") this was an extraordinary case where the Taxing Master had a discretion.

THIS was a summons taken out on behalf of the Bristol, West of England, and South Wales Permanent Building Society, asking that the objections of the applicants, dated the 13th July, 1887, to the taxation of costs in this matter under the Order dated the 24th February, 1887, might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly, and that the plaintiffs might be ordered to pay to the applicants their costs of the objections and of this application and consequent thereon.

By mortgage of the 1st February, 1884, the defendant, Hannah Rees, the administratrix of Thomas Rees, deceased, mortgaged to the applicants, the Bristol, West of England, and South Wales Permanent Building Society, certain leasehold hereditaments at Swansea to secure repayments, by the usual instalments, of £3,000 and interest. The action (to which the Building Society was not a party) was one to administer the estate of the intestate, for the purpose of which estate the money was borrowed.

On the 16th February, 1886, the plaintiffs obtained an order to sell the leasehold estates of the intestate, and that the purchase money should be paid into Court to the credit of the action—"Proceeds of sale of leaseholds." The Building Society knew nothing of this order, and there was no mention of their security in it.

In January, 1886, the plaintiffs' solicitors applied to the Building Society to concur in the sale, and release the respective lots at certain prices to be agreed without requiring the rest of the mortgaged property to be redeemed.

Some correspondence took place, and ultimately a valuation was made by the Society's surveyors, and on the 22nd February, 1886, the Building Society's solicitors sent to the plaintiffs' solicitors a schedule of reserve prices under which the properties were not to be sold, and an undertaking to concur in the sale. This undertaking was special in form—namely :

"We consent to concur in the sale of any of the above properties,

so that the same be not sold below the reserves stated in the column headed 'Reserves on each lot required by the mortgagees,' and so that the purchase money of each lot sold be paid to us until the whole sum due to us be repaid, and on condition that all costs and expenses already or that may be incurred by us in or about or relating to this consent, or the sale of all or any of the lots, including the sum of £5 5s. paid by us to a surveyor for advising on the reserves, be paid to us out of the proceeds of sale, such costs and expenses to be taxed as between solicitor and client."

Kay, J.
1887.

On the 25th May, 1886, the plaintiffs' solicitors wrote asking the Building Society to allow the purchase moneys to be paid into Court to the credit of the action instead of the Society, and on the 28th May, 1886, the solicitors of the latter replied that the Society might assent, if provision was made in the Order for payment of their principal, interest and costs in priority to any other payments out of the money to be paid into Court.

On the 4th June, 1886, the plaintiffs' solicitors wrote to the Building Society's solicitors with draft particulars and conditions of sale as settled by the conveyancing counsel to the Court "for your perusal," and the Building Society's solicitors replied that until the priority of their clients' claim on any money to be paid into Court was provided for they could not approve the conditions.

Negotiations took place between the London agents for the parties, and then the agents for the Building Society found the order for sale was already made, and pointed out the necessity of the purchase money being paid into Court to an account which would give notice of the incumbrance.

The plaintiffs' agents then obtained an appointment before the Chief Clerk, which the agents for the Building Society attended, and on the facts being explained the Chief Clerk, on the 24th June, 1886, directed the order for sale to be amended by adding a direction that the money to be paid into Court thereunder should not be dealt with, except for the purpose of investment, without notice to the Building Society. Then the solicitors for the Society returned the conditions approved on the 26th June, 1886, allowing the provision that the purchase moneys were to be paid to the credit of the action to stand.

The various conveyances to the purchasers were sent to the

Kay, J.
1887.

solicitors of the Building Society to peruse, and in respect of these the Master allowed the charge of 1s. a folio for perusal.

On the 24th February, 1887, an Order was made referring it to the Taxing Master to tax the Bristol, West of England, and South Wales Permanent Building Society their costs of the application, including their costs of and relating to their security, dated the 1st February, 1884.

The Taxing Master disallowed the fees charged at the rate of 1s. per folio for perusing the conditions of sale, but allowed a fee of £1 1s. for reading them.

The Society took objection to this disallowance in their bill of costs for the following reasons :—

Reason for allowance. It is contended that conditions of sale come within the word “documents” used in Schedule 2 to the rules made under the Solicitors Remuneration Act, 1881, and that 1s. per folio is the proper charge for perusing the conditions on behalf of the Building Society, who were parties concurring in the sale. The Building Society were bound by such conditions, and it was necessary for their solicitors to peruse and examine every word of the conditions with the utmost care to see that there was in them no provision injurious to the interests of the Society, and the perusal would necessitate reference to the consideration of the title deeds.

In answer to the objections of the Building Society the Taxing Master said :—

“I am of opinion that the conditions of sale are not such documents as are intended by the word ‘documents’ in the schedules referred to, the perusal of which in any circumstances entitled a solicitor to charge for it at the rate of 1s. per folio ; but in this case the Building Society were mortgagees consenting to a sale made, not by the Society but under the direction of the Court in an action for administering the estate of the mortgagor, the particulars and conditions were settled by the Judge in Chambers, and the Society were only concerned to see that the reserve prices were sufficient, and the purchase moneys were so dealt with as to be available for payment of their mortgage money. The Society were not responsible for nor bound by either particulars or conditions. In these circumstances I allowed the solicitors of the Society a fee of £1 1s. for reading the particulars and conditions,

and I disallowed the fees charged at the rate of 1s. per folio for perusing them. I have considered the objections, and I was still of the same opinion. I disallow the objections.

Kay, J.
1887.

“(Signed)

“G. H. DREW.”

The heading of Schedule 2 of the General Order in pursuance of the Solicitors Remuneration Act, 1881, is “instructions for and drawing and perusing deeds, wills, and other documents.” Then follows:—“For perusing 1s. per folio.” Then “in extraordinary cases the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit.”

Ingle Joyce (Marten, Q.C., with him) for the Building Society :

The question is, were the solicitors of the applicants justified in perusing these conditions of sale? The perusal of these conditions comes within Rule (2 c) of the General Order made in pursuance of the Solicitors Remuneration Act, 1881, “and in respect of all other deeds and documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule 1, hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule 2 hereto.” Schedule 2 provides a scale for “perusing deeds, wills, and other documents,” and 1s. a folio is the charge for perusing. I submit that conditions come under the word “documents.” The applicants only approved of the conditions on the express understanding that all their costs, charges, and expenses should be paid. [KAY, J.: The applicants were not bound by the conditions, they could refuse to execute the deeds.] Not after they had authorised the mortgagor to put the property up. The mortgagor asked them to consent and concur in the sale and consent to the conditions. It was the duty of the solicitors of the applicants to peruse them. They perused and approved of them at the request of the mortgagor: *Re Parker* (1), *Ante*, p. 273. *Re Robertson* (2). *Ante*, p. 339.

Warrington for the plaintiffs.

(1) 52 L. T. Rep. N. S. 686 ; 29 Ch. Div. 199.

(2) 19 Q. B. Div. 1.

Kay, J.
1887.

KAY, J. :—

In my opinion the Taxing Master was right. I do not lay down the rule that in no cases are conditions to come under the word "documents," Schedule 2 of the General Order. The facts are these, a mortgagor is selling leaseholds under an order of the Court in an administration action to which the mortgagees are not parties. The mortgagees are asked to concur in the sale, and draft particulars and conditions of sale are sent by the plaintiffs' solicitors to the solicitors of the mortgagees to peruse. The mortgagees made out a bill of costs against the mortgagor, the costs of concurring in the sale. In the bill of costs which is sent in, a fee is inserted for perusing particulars and conditions of sale at the rate of 1*s.* a folio. The Taxing Master taxed off £2 of this charge. Now, in Rule 2 of the General Order it is provided that, "in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule 1, hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule 2." And the scale fixed by Schedule 2 is, "for perusing 1*s.* per folio," but in extraordinary cases the Taxing Master has a discretion. In this case the mortgagor will have to pay her own solicitors for perusing the conditions at the rate of 1*s.* per folio; but the applicants ask the mortgagor to pay the costs of the mortgagees for perusing—in fact, to pay them again. This is not a question between a mortgagee and his solicitor, but it is contended that the mortgagor must pay the mortgagees' costs for perusing the conditions. The Taxing Master considered that the conditions did not come within the word "documents," but I am not going to hold that 1*s.* per folio is not a fair charge for perusing conditions in every case; but this is an extraordinary case of mortgagees' solicitors charging the mortgagor for perusing conditions. In accordance with Schedule 2, "in extraordinary cases the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit." I am of opinion that conditions of sale are within the rule, but not so that in any circumstances solicitors can charge 1*s.* per folio. The Taxing Master gave his reasons for disallowing 1*s.* per folio, and in my opinion it was a case clearly within the Taxing Master's discretion; it was not an ordinary case of perusing conditions, but an extraordinary one to which the scale

of fees did not apply. The mortgagees' solicitors were in no sense required to peruse the conditions as if they were acting for the vendors; the Building Society were not responsible; all the solicitors had to do was to see that the mortgagees were safe—that enough money was fixed as a reserve price, and no further. Suppose the particulars and conditions had contained a misrepresentation, the mortgagees were not bound. It was enough just to read the conditions and see that the mortgagees were safe. The Taxing Master was right, I do not say on the ground that conditions are not “documents” referred to in Schedule 2, but because this is not an ordinary case coming within the rules, but an extraordinary case where the Taxing Master had a discretion.

Kay, J.
1887.

Summons dismissed with costs.

Solicitors: *Ley, Lake, & Ley*, for *Danger & Cartwright*, Bristol; *Bell, Brodrick, & Gray*, for *Linton & Kenshole*, Cardiff.

MARTIN v. NIXON.

(By permission, from 22 L. R. Ir. 138; s. c. 22 Ir. L. T. R. 9.)

Ex. Div.
1887.

Dec. 10.

(Before PALLES, C.B., and ANDREWS, J.)

(1887—A. No. 352.)

Costs—Taxation between party and party—Attendance of solicitor at trial in a county where he does not usually practice—Gen. Ord. 11 (June, 1882), Schedule item 29.

The solicitor for the successful party can only be allowed, as between party and party, the fees prescribed in Gen. Ord. 11 (June, 1882), item 29, for attending a trial of the action, though the place of trial be a county of which he is not a practitioner.

SUMMONS on behalf of the defendant, to review the taxation of costs.

The action was brought for a money demand, and admittedly fell within the lower scale of taxation. It was tried at the Lifford Summer Assizes, 1887, and resulted in a verdict for the defendant: that £30 lodged in Court was sufficient.

Ex. Div.
1887.

The notice of trial was served for Saturday, the 16th July, and the defendant's solicitor, Mr. Walker, who practised in Dublin, and was not a practitioner in the county of Donegal, left Dublin on Friday, 15th July, to attend to the case. The Record Court was occupied until the afternoon of Monday, 18th July, in hearing appeals and another record; the present case being tried and disposed of in the afternoon of that day. Mr. Walker returned to Dublin on Tuesday, the 19th July.

The costs, as furnished and lodged for taxation, included £10 10s. for the solicitor's attendance at Lifford, and £3 3s. travelling expenses.

The Taxing Officer, in lieu of these charges, allowed £3 3s. for the day of hearing and £2 10s. travelling expenses, holding that the allowance for attendance at the Assizes was governed by item 29 in the Schedule to Rule 2, of the Orders of June, 1882.

Gerrard, Q.C., and Moore, for the defendant:—

Ante, p. 343. In *Macnamara v. Malone* (1), the solicitor was allowed two guineas for each day he was necessarily absent from Dublin. That was on taxation between solicitor and client. But the principle of taxation in both cases is the same: Order 98 of 1854. This case is not affected by the rules under the Judicature Act, and therefore, under Gen. Ord. X., Rule 28, the attendance of the solicitor at the trial should be paid for according to the scale applicable prior to the Judicature Act, *i.e.*, as adopted in *Macnamara v. Malone* (2).

There was no appearance for the plaintiff.

Ante, p. 343. The COURT held that the case was distinguishable from *Macnamara v. Malone* (3), on the ground that the costs under taxation were party and party costs, and that the allowances for attendance at the trial being prescribed by the Order of June, 1882, Rule 2, Schedule item 29, no further or other charges could be allowed by the Taxing Officer, although in the case of Dublin solicitors attending at trials in country venues, such allowances were obviously an insufficient remuneration.

Solicitor for the defendant: *R. C. Walker*.

(1) 18 L. R. Ir. 269. (2) 18 L. R. Ir. 296. (3) 18 L. R. Ir. 269.

ANTHONY v. WALSHÉ.

(By permission, from 22 L. R. Ir. 619.)

(In the Exchequer Division, before ANDREWS, J.)

(1886—R. No. 436.)

Ex. Div.
1888.Feb. 9, 11,
22.Appeal
1888.

July 7.

Plaintiff suing in person—Practice—Costs—Travelling expenses.

The travelling expenses of a party suing in person, incurred for the purpose of conducting in person interlocutory proceedings, are not taxable items in party and party costs awarded against the opposite party in the action.

APPLICATION by the defendants to review the taxation of the plaintiff's bill of costs.

The action was brought by the plaintiff, suing in person, to recover £4,000 damages for defamation of character, and also conspiracy to injure her.

The defendants moved, under the 6th sect. of the Common Law Procedure Act, 1870, to remit the action for trial before the County Court Judge of the County of Waterford, at the next ensuing Sessions; and on the 24th January, 1888, the said motion was refused with costs, to be paid by the defendants to the plaintiff, when taxed and ascertained.

The plaintiff, who was described in the endorsement of the writ as residing at Tallow, in the County of Waterford, then furnished her bill of costs for taxation. Amongst others she claimed the following items:—

	£	s.	d.
No. 1. Jan. 7.—Paid travelling fare to Dublin from Tallow, County of Waterford, including fare for special car to station, five miles from Tallow,	1	17	6
No. 8. Jan. 14.—Paid for returning home to County of Waterford, -	1	17	6
No. 9. Jan. 19.—Received three additional affidavits of defendants; paid travelling fare to Dublin from County of Waterford, -	1	17	6
No. 23. Jan. 24.—Paid for travelling fare from Dublin home to Tallow, County of Waterford, -	1	17	6

Ex. Div.
1888.

No. 35. Feb. 1.—	Paid for travelling from country to attend taxation, and for re- turning home after it to the County of Waterford,	£ s. d. 2 17 9
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The defendants objected to these items on the ground that under General Order III., Rule 2, the plaintiff should have a registered address within the municipal boundary of the City of Dublin (1).

The Taxing Officer (Mr. Davis) overruled this objection, on the ground that the General Order referred merely to the service of documents, and he certified the costs accordingly. The defendants then applied to the Court for a review of the taxation of the said items, and by Order of the 9th February, 1888, the said costs were referred back to the Taxing Officer for review, with liberty to the defendants to carry in their objections before the said Officer, and the Order also directed a memorandum, requesting information as to the practice, to be furnished to the Taxing Officers.

The Taxing Officers replied as follows:—

We find no definite rule of law or practice in the taxation of costs when the Court gives costs to a party who sues in person, and who resides out of Dublin, by which the travelling expenses of such party to and from Dublin are a taxable item in the party and party costs, ordered to be paid by the other party; and there is no case that we are aware of, in our office, where such a question has been considered or dealt with, save in the following cases stated by plaintiff, namely:—

1. *Anthony v. Murphy*—Exchequer. We find a bill of costs taxed by the late Master Hearn, under orders of 5th May, 1881, and certified 5th February, 1885, in which the plaintiff's travelling expenses from Tallow to Dublin, to resist a motion, are allowed at £2 13s. 7d.

2. *Anthony v. Noble and Murphy*—Exchequer. We find a bill of costs taxed by the late Master Hearn, under order of 17th May, 1881, in which a sum of £2 13s. 7d. is allowed to plaintiff for travelling expenses to Dublin to resist a motion.

(1) In the endorsement on the writ it was stated that the writ was issued by "Mary Anne Anthony, of 6, Lower Mountjoy-place, in the City of Dublin," and further on that the plaintiff's address was at Tallow, in the County of Waterford.

3. We also find the following bills of taxed costs of action, and other proceedings in which travelling expenses are allowed to the plaintiff:—

Ex. Div.
1888.

(a) *Anthony v. Fitzgerald and Redmond.* In this case the bill was taxed in July, 1884, under order of 17th March, 1884, by Mr. Fitzgerald, late Taxing Master. There is allowed therein to the plaintiff:—"For travelling fare to Dublin, to attend taxation, and back, including paid car-hire from Tallow to station and back, £3 1s. 9d."

(b) *Anthony v. Prendergast.* The costs were taxed in 1885, under order of the Court of Appeal, 10th March, 1885, by Master Fitzgerald. We find travelling expenses from Tallow to Dublin are allowed.

We are unable to say what the forms of the orders in these cases are, as copies are not annexed to the costs.

DAVID COFFEY.

SYDENHAM DAVIS

Consolidated Taxing Office,
16th February, 1888.

His Lordship made the following order:—

"THE COURT being of opinion that the said items, Nos. 1, 8, 9, 23, and 35 (consisting of the plaintiff's travelling expenses) in the said bill of costs are not properly taxable, as between party and party, under the said Order, dated the 24th January, 1888, and should not be included in the costs thereby awarded to the said plaintiff, doth hereby refer back the said bill of costs, in respect of the said items, to the said Taxing Officer for his revision; and doth order that the plaintiff's objection to the disallowance of the items mentioned in her notice of the 9th February, inst., be overruled, and that both parties do abide their own costs of this motion."

The plaintiff appealed to the Court of Appeal, and appeared in person in support of the appeal (1).

Matheson, for the defendants.

Lord ASHBOURNE, C.:—

July 7.

This case raises an important and interesting question of practice. It is an appeal from an order of the Exchequer Division, who ruled

(1) In the Court of Appeal, before Lord ASHBOURNE, C., and FITZGIBBON, BARRY, and NATSH, L.JJ.

Appeal.
1887.

that certain items, consisting of the plaintiff's travelling expenses in the bill of costs, were not properly taxable as between party and party, and referred back the bill of costs in respect of the said items to the Taxing Officer for his revision. Practically the question for us is, whether a plaintiff suing in person is entitled to his travelling expenses in coming up from the country to Dublin to move or oppose motions, or perform other acts necessary during the progress of a case, and which are usually performed by the town agent of a country solicitor.

There is no rule or decision dealing expressly with the subject. There is a rule which throws some light upon the question, and that is Order III., Rule 2, which is as follows:—"A plaintiff suing in person shall endorse upon every writ of summons and notice in lieu of service of a writ of summons, his place of residence and occupation; and also if his place of residence shall not be within the municipal boundary of the City of Dublin, another proper place to be called his address for service, which shall be within such municipal boundary where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him."

Now there the Rule indicates fully that a plaintiff suing in person shall not subject the other side to the inconvenience of having to look about for his residence, or of having to send documents to him in the country. A defendant who appears in person is in a different position which it is not necessary to discuss. A plaintiff suing in person might have to appear at the trial to conduct his case, and thereupon the question as to his right to travelling expenses arises. A plaintiff appearing in person may also be a necessary witness in his case. These are not the questions before us. The case before us is that of a plaintiff in person appearing and successfully opposing a motion to remit and claiming her travelling expenses as part of the costs of the motion which were awarded to her. The Exchequer Division decided that a plaintiff so suing is not entitled to onerate the other side with such expenses. The question is not met by any plain authority; but I observe that in an Order made by this Court, in the case of *Anthony v. Prendergast* (1), the word "expenses" was added to the costs which were awarded to the present plaintiff,

Ante, p. 427

(1) See *ante*, p. 621.

Appeal,
1888.

suing in person, when she succeeded in obtaining a reversal of an order of the Common Pleas Division, which shows that the word "costs" standing alone would not have been sufficient to entitle the plaintiff to her travelling expenses. In Gray on Costs, p. 498, I find the following passage:—"At the same time the mere fact of the parties being examined is not by any means to be considered sufficient to establish a claim for their expenses as witnesses; and if it appear that their attendance was unnecessary, or that its real object was to superintend the conduct of the case, the claim ought to be rejected." This shows that even when persons come up to a trial and are examined their presence is scrutinized closely, and if it is found that they have come up for the purpose of getting their expenses, such a proceeding will not be allowed. In my opinion, no valid ground can be suggested for the contention that a plaintiff suing in person is entitled to more than the ordinary costs as between party and party. Here the plaintiff lives at Dungarvan; she might be living at a much more remote place; but the liability of the opposite side to costs cannot depend upon the more or less remote residence of the plaintiff. If so, the matter might become almost a *reductio ad absurdum*. It was suggested that if a solicitor and counsel had been employed in this case the defendant's costs would have been greater. I can see no force in that argument. In my opinion the decision of the Exchequer Division was right, and this appeal must be dismissed with costs.

FITZGIBBON, L.J. :—

This appeal appears to me to involve some interesting historical and constitutional considerations. I understand that the Order appealed from allows the plaintiff all her Court fees—that is, all money which she was, under the rules, obliged to pay in the conduct of her case, but disallows her personal expenses of attending in Dublin before the Court. We were told during the argument that there was no authority on the question whether travelling expenses should be allowed to a litigant suing in person; and assuming that there was no such authority, I set about considering the case on principle and came to the conclusion, for reasons which I shall give, that such expenses are not allowable. This conclusion has since been corroborated by an authority discovered by my

Appeal.
1888.

brother Naish, and which I will leave it to him to quote. The law of costs is founded on the Statute of Gloucester, 6 Ed. I., cap. I., the first place where "costs" are mentioned. By that enactment it is provided that in certain Real Actions "the Demandant may recover against the Tenant the costs of his writ purchased, '*les coustages de son brief purchase*,' with his damages." Upon analogy with this statute, costs were afterwards given in other actions, but what the successful litigant got was what he was "out of pocket" by the suit. The principle was extended to the fixed and regulated costs of obtaining professional aid, but in constitutional theory our Courts are open to all suitors who come personally before them, and they are supposed to attend in person throughout. *Magna Charta* fixed the Common Pleas, the original Court for cases between subject and subject, in a certain place to save suitors the expense of following the king; the necessity for their continual personal presence is indicated in the old form of "calling the plaintiff" on a non-suit. Yet the expense of personal attendance is nowhere recognised. From the date of the Statute of Gloucester to the present time there is no recorded interest in which a suitor got, or even claimed, his own travelling expenses as legal "costs." Nor could it be reasonable that the amount which an unsuccessful defendant must pay should depend upon the place where the person suing him happened or chose to reside. The order of the Taxing Officer is not even quite consistent, for he allowed the plaintiff her cab fare from Drumcondra to the Four Courts to swear an affidavit, though he disallowed as well her cab fare as all her other expenses of coming to Drumcondra. In my opinion she has no claim for the expense of attending *as a suitor* at any time. All the rules and statutes as to costs are inapplicable to such personal expenses. For instance, where half fees are allowed, is a plaintiff suing in person entitled to half his travelling expenses, or is the suitor to get his own expenses in addition to the costs of his solicitor where his personal attendance is desirable? Every suitor may either conduct his own case, attending Court at his own expense for the purpose, or he may employ professional practitioners to conduct it for him, and for such assistance fixed costs are allowed. If, through confidence in his own powers, mistrust of lawyers, want of money, or for any other reason, he conducts his own case, the

other party is not to pay him for his time, trouble, or personal expense, in doing so. The way the theory works out in this particular case shows its reasonableness. The bill of costs furnished amounts to £17 10s. 7d.—probably twice as much as if solicitor and counsel had been employed—and the expense might have been many times more if the plaintiff had lived further away, or had gone back and forward between Dublin and Waterford more frequently. Again, the plaintiff chooses to write out all her documents with her own hand. Is she entitled to scrivenery charges? If so, she makes a professional profit without belonging to the profession. I am of opinion that she is not entitled to any of the charges claimed on the appeal. This decision does not affect the right of a party *attending as a witness* to his expenses; and I should add that in *Anthony v. Prendergast* (1), where we expressly gave the present plaintiff her personal expenses in another action, the order was one made “upon terms,” one of which was that the defendant should pay the plaintiff’s travelling expenses in coming to Dublin to resist a motion to set aside a judgment regularly marked, but which was set aside upon the ground of a fatality for which she was not answerable, and on an affidavit of merits. The very necessity for expressly giving such expenses indicates that they are not included under ordinary costs. Ante, p. 427.

BARRY, L.J. :—

I agree in the general proposition that a suitor suing in person is not entitled to incur the expense of coming to Dublin from his home, for the purpose of conducting the ordinary operations of a suit, and to recover the amount of such expense from the opposite party. But I entertain a doubt as to whether, as a matter of justice, a plaintiff suing in person who is dragged up to Dublin by a motion to remit the action—and my observations are addressed to such a case alone—is not entitled to recover the expense he is thus put to from the party who instituted the motion when it is unsuccessful. That is what occurred in the present case, and I confess I do not see the justice of not allowing to the plaintiff all the costs and expenses she was thus put to. On the general

(1) See ante, p. 621.

Appeal.
1888.

question I agree with the Lord Chancellor and Lord Justice FitzGibbon, that in the ordinary proceedings of a suit a suitor in person is not entitled to the expenses incurred in coming up to town on every occasion; but I see every justice in an order being made in this case, similar to that made in the case mentioned by the Lord Chancellor and Lord Justice FitzGibbon, that Miss Anthony should get her costs and expenses, resulting from her being compelled to come to Dublin to resist the defendant's unsuccessful motion to remit her action.

NAISH, L.J.:—

I concur with the other members of the Court in holding that if a suitor conducts his case in person his travelling expenses are not part of the costs which should be allowed to him. The right of a plaintiff to costs depended originally on the statute of Gloucester, and Lord Coke in commenting on it says, 2 Inst. 286:—“*Costages de son briefe purchase*. Here is expresse mention made of the costs of his writ, but it extendeth to all the legall cost of the suit, but not to the costs and expenses of his travell and losse of time.”

So that a party suing in person did not get his expenses of travelling up to town to conduct his case. This, of course, does not apply to a case where the plaintiff, being examined as a witness, is entitled to witness's expenses.

Decision below affirmed.

Solicitor for the defendants (respondents): *Daniel Dunford.*

Re KEEPING AND GLOG.

(*By permission, from 58 L. T. 679.*)

Stirling, J.
1888.

Feb. 16, 17,
18, 23.

Solicitors Remuneration Order, Rule 2, Sched. I., Part I.—Investigating and deducing title—Family arrangement.

Under a provision contained in a will the testator's sons took the real estate at a valuation, and took over the assets and liabilities of his business, the sons giving a mortgage to the trustees to secure the purchase money. The same solicitors acted for all parties in preparing the necessary deeds, and charged full vendors' and purchasers' costs, and also mortgagor's and mortgagee's costs under the scale :

Held, that they were only entitled to remuneration under Schedule II., for, as they had not "investigated and deduced title," the scale charge did not apply.

A TESTATOR, who carried on business in Yorkshire, by his will gave his residuary real and personal estate to trustees upon trust for sale and conversion, and provided that such sale and conversion might be postponed at the discretion of the trustees, that the real estate should not be sold during the lives of any of his sons until the same should have been offered by the trustees to his sons jointly or in common at a valuation, and they should have refused to purchase the same ; and he declared that if his sons, or either of them, should elect to take the real estate under this option, they should accept the same as part of their or his shares or share under the trusts declared by the will of the moneys to arise by the sale and conversion, and bring the value of the same into hotchpot. The testator left two sons and four daughters, and in 1885 the younger son attained twenty-one.

In September, 1885, the trustees, who resided at Selkirk, in Scotland, and had employed Messrs. Lang and Steedman, a Scotch firm of solicitors, to carry out the legal matters of the trust, made a formal offer of the property to the sons, which they accepted, and an arrangement was entered into and approved by the whole of the beneficiaries under which the sons were to take the real estate at a valuation as directed by the will, and were also to take over the whole other assets of the testator's business at a valuation, and to undertake the liabilities of the business ; there was also to be a mortgage of the real estate by the sons to the trustees to

Stirling, J.
1888.

secure the purchase money. The trustees then instructed Messrs. Lang and Steedman to carry out this arrangement, and for this purpose it became necessary for them to instruct English solicitors to prepare the necessary deeds of conveyance. They accordingly sent the documents relating to the property to Messrs. Keeping and Gloag with instructions to prepare the necessary deeds. These gentlemen perused the deeds and abstracts of title, which they sent to counsel with instructions to draw and settle the drafts, which he did. When the business was concluded Messrs. Keeping and Gloag sent in their bill of costs, in which they charged, under Schedule I., Part I., of the Remuneration Order, full vendors' and purchasers' costs on the consideration money mentioned in the deeds, and mortgagor's and mortgagee's costs, under the same schedule. On taxation the Taxing Master held that the whole matter was a family arrangement, and for that reason the charges should have been made under Schedule II. The solicitors objected to this on the ground that the work done was in respect to business connected with the completed sale, purchase, and mortgage of freehold property, and the remuneration ought to be according to Schedule I. The Taxing Master answered as follows :—

Being of opinion that all the elements are wanting from the transaction to entitle the solicitors to scale fees under Schedule I. of the Solicitors Remuneration Order, I have allowed them fees in detail pursuant to Schedule II. of that Order.

The scale in Schedule I. gives a fee to the vendor's solicitor for deducing title, and another for investigating title; similarly it gives a fee to the purchaser's solicitor for deducing and another for investigating title; it also gives a fee to the mortgagor's solicitor for deducing title, and a fee to the mortgagee's solicitor for investigating title.

Graham Hastings, Q.C., and *Lambert* for the solicitors, contended that they were bound on their instructions to investigate the title, and that if they had failed to do so, and the title had turned out bad, they would have been liable to an action for negligence. They pointed out that, though the Taxing Master had said all the elements were wanting to entitle the solicitors to the scale fees, yet he had practically allowed all the elements in detail. Even if the transac-

tion was a family arrangement, it was certainly a sale, purchase, and mortgage, and they were therefore entitled to scale fees.

Stirling, J.
1888.

Pearson, Q.C., and *Ashton Cross* for the clients.

STIRLING, J. :—

The case was opened as one of considerable importance, and I thought at first I should have to discuss and decide questions which are novel and not covered by authority; but upon the view which I take, as far as those new questions are concerned, it will not be necessary for me to go into them. The case is governed by decisions of the Court of Appeal, and all that I have to do is to apply the law to a somewhat novel state of facts. The question to be decided is, whether the remuneration of the solicitors is to be according to Schedule I., Part I., or according to the old system as altered by Schedule II. The Taxing Master had held that it is to be according to Schedule II., and I am now asked to hold that the Taxing Master is wrong. Schedule I., Part I., has been considered by the Court of Appeal, and I am bound by what that Court has held. It has been held in *Re Lacey & Son* (1) with *Ante*, p. 238. reference to the scale fee, that it is not payable unless substantially the whole of the business in respect of which the *ad valorem* remuneration is chargeable has been done by the solicitor. [His Lordship then referred to the judgment of the Lords Justices in that case, and continuing said:] That has been followed by Courts of first instance, and has been repeated by the Court of Appeal in *Re Newbould* (2), which decided another point in addition, but followed *Re Lacey* to this extent. There the solicitor had sought to bring himself under one heading, and sought to charge for business under another. He had deduced a title to freehold and copyhold property and charged the scale fee for that, and had conducted a sale of the property, but had not conducted it in its entirety, for he employed an auctioneer, and had not paid him out of his own pocket. It was held by the Court of Appeal that the solicitor was only entitled to be paid according to that part of the scale within which he could bring himself. That is the rule which I have to guide me, and I have simply to apply it to the particular

(1) 49 L. T. Rep. N. S. 755; 25 Ch. Div. 301.

(2) 20 Q. B. Div. 204.

Stirling, J.
1886.

facts of this case. [His Lordship then stated the facts in detail, and continuing said:] Upon the instructions given to the solicitors, they claimed to be entitled to act as solicitors for the vendors as well as for the purchasers, and to investigate the title for both. It was said as a matter of law that upon such instructions a solicitor was bound to investigate the title. That seems to me a novel proposition, which is not supported by the cases which have been cited. Those cases were two, the strongest being *Wilson v. Tucker* (1). No doubt it was the duty of the solicitors to read the deeds with a view to the preparation of the necessary documents, but not with a view to investigate the title. That being so, they did not bring themselves within the rule so as to entitle them to the scale fee. But have they, in fact, done the work? Supposing it to have been their duty to deduce title, the contract was really an open contract. The duty of a solicitor in such a case is well ascertained. He must commence the title with a proper root—viz., a deed forty years old, and having started with that he is bound to trace it downwards till the vendor is reached, and in so tracing it a great variety of matter has to be gone into. Now, have the solicitors in this case in point of fact deduced or investigated such a title? They have perused the deeds and prepared an abstract which they sent to counsel with instructions to settle the deeds and documents. The instructions sent with the abstract were not such as would have been expected if the title was to be investigated—viz., instructions to peruse and advise. What was the duty of counsel? He ought, of course, to read the abstract for the purpose of preparing the deeds, but not to make requisitions, &c., as he would do if he were instructed to advise upon the title. Counsel indeed in this case seems to have taken that view. He has made no requisition. He pointed out that the abstract showed a good title as to one part of the property, but as to another part it only showed a title to a moiety. That was a matter which might be properly gone into in the preparation of the conveyance. Then he has concluded his opinion with the following observation:—“It is obvious that, as regards parts of this property, the title shown by the abstract is far from being a marketable title, and is hardly such as a willing purchaser could be advised to accept

without further explanation." That was an observation which it was highly proper for counsel to make. But there was no obligation on the solicitors to deduce or investigate a marketable title. They had simply to carry out a family arrangement. That being so, they do not bring themselves within the scale. Having regard to the whole circumstance of the case, I have come to the conclusion that the solicitors were not really meant to do all the duties which they were bound to do in order to bring themselves within the rule. The objection therefore must be disallowed.

Stirling, J.
1888.

Solicitors: *Keeping and Gloag; Speechly, Mumford & Co.*

In Re HASTIES AND CRAWFURD.

(*By permission, from 36 W. R. 572.*)

Chan. Div.
1888.

April 18.

(NORTH, J.)

Solicitor—Remuneration—Lease—Rent—Shares—Money payment or premium—Solicitors Remuneration Order, 1882, Schedule I., Part II., Rule 5.

A firm of solicitors were employed by a lessor to prepare for him a lease of certain property for twenty-one years to a Company, the consideration for the lease being a rent of £80 and the issue of 400 shares of the nominal value of £10. None of the Company's shares had been sold, so that no market value had been placed upon them; and 200 of the 400 shares had not been issued.

The solicitors charged the scale fee on the rent of £80, and also the scale fee for deducing title, perusing and completing deed as upon a premium of £4,000, the amount of the nominal value of the 400 shares:

Held, that they were not entitled to make the latter charge, as the value of the shares could not be estimated, and Rule 5, Part II., Schedule I., of the Remuneration Order, 1882, did not apply to such a case.

ADJOURNED SUMMONS.—Messrs. Hasties and Crawford were employed by Lord Wallscourt, the tenant for life of the Ardree Estates, in the County of Galway, to prepare for him a lease of certain property to the Ardree Fishery Co. (Limited). The lease and counterpart were duly prepared, and the lease was executed by Lord Wallscourt, but the counterpart was not executed by the Company. Messrs. Hasties and Crawford alleged that Lord

Chan. Div.
1888.

Wallscourt had agreed to pay to them the scale fee for the preparation of the lease.

It was witnessed in the lease that, in consideration of the "rent and profits" thereafter reserved and the covenants thereafter contained, and on the part of the Company to be observed and performed, the lessor thereby demised unto the Company the property therein described, and the consideration was as follows:—
"Yielding and paying unto the lessor, his heirs, successors, and assigns, in respect of the premises hereby demised, the clear yearly rent of £80, to be paid by equal half-yearly payments, . . . and also yielding and paying unto the lessor, his heirs, successors, and assigns, the profits accruing on an issue to him, or to proper parties on his behalf, of 200 shares of the nominal value of £10, such shares to be allotted and issued to the lessor or to such parties as aforesaid as fully paid up at the time of allotment; and also yielding and paying unto the lessor, his heirs, successors, and assigns, the profits accruing on the further issue as aforesaid of 200 shares of the nominal value of £10, such last-mentioned shares to be allotted to and issued to the lessor or to proper parties on his behalf as fully paid only as when the unpaid portion of £5 per share, or any part thereof, shall be called up upon the partially paid-up shares in the proportion of two fully paid shares of £10 each for each 1s. per share called up upon the said partially paid shares."

The first 200 shares had been allotted to trustees for Lord Wallscourt, but the other 200 shares had not been allotted. No market value had been placed on the shares of the Company, none of which had been sold.

In their bill of costs delivered to Lord Wallscourt Messrs. Hasties and Crawford charged, as the scale fee for deducing title, perusing and completing deed upon a premium of £4,000 in shares, £40—viz., one and a half per cent. on the first £1,000, £15; one per cent. on the second and third £1,000, £20; and one-half per cent. on the fourth £1,000, £5.

On taxation the Taxing Master held that the scale fee did not apply to, and could not be charged in, such a case; and, in the presence of the parties, allowed them a list of fees which appeared to him fair and customary in such circumstances.

Messrs. Hasties and Crawford submitted objections that the Taxing Master was bound by the General Order, and should allow the scale charge, and, if not, that he had no authority to say what sum they were entitled to without affording them an opportunity of delivering a detailed bill of costs, but the Taxing Master disallowed their objections, giving his reasons as follows:—"Remuneration by scale is not, as it appears to me, the proper mode of remuneration for the preparation of the lease in question, as the lease does not afford a basis for assessment of a scale fee—a premium, the value of which cannot be estimated (the shares in the Fishery Company not having, and never having had, a marketable value), having been given for the lease in addition to the rent (£80) reserved by it. The solicitors alleged on the 15th December that they could produce evidence by letters of an agreement on the part of the petitioner to pay the scale fee demanded, but they failed to produce such evidence on either of the occasions (the 16th and 20th of December) when the matter was again before the Taxing Master. The list of fees in detail allowed by the Taxing Master for the preparation of the lease and counterpart . . . was prepared by the Taxing Master on the 20th of December in the presence of the parties, and Mr. Hasties himself sent to his office for documents to enable the Taxing Master to prepare it. The allowances are in the discretion of the Taxing Master; these allowed in the present case being, in my opinion, fair, and such as are customary under similar circumstances. Mr. Hasties did not at the time offer, and has never offered, any objection to the allowances, beyond putting forward his claim to remuneration by scale on the basis suggested by the bill of costs under taxation."

Messrs. Hasties and Crawford then took out the present summons for a review of taxation.

The General Remuneration Order, 1882, Schedule I., Part II., Rule 5, provides:—"Where a conveyance or lease is partly in consideration of a money payment or premium and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium."

Chan. Div.
1888.

Cozens-Hardy, Q.C., & Swinfen Eady, for the summons:—The solicitors are entitled to charge the scale fee on the premium of £4,000, the nominal value of the 400 shares which form part of the consideration for the lease. For the purpose of stamp duty on the lease, the shares had to be estimated at their nominal value. (They referred to the General Remuneration Order, 1882, Schedule I., Part II., Rule 5; 33 & 34 Vict., c. 97, s. 97.) The Taxing Master ought to have directed the solicitors to make up another bill of costs to be taxed, and not allowed them a list of fees which he thought reasonable.

[NORTH, J.:—I do not think that the stamp duty on the lease has anything to do with the question.]

Bramwell Davis, contra:—The solicitors have no right to charge the scale fee for deducing title, perusing and completing deed as upon a premium of £4,000 in shares. The scale fee does not apply to a case where the value of the premium cannot be estimated. The shares of the Company have no marketable value, and the second 200 shares mentioned in the lease have not yet been issued.

Cozens-Hardy, Q.C., replied.

NORTH, J.:—The lessee is to receive £80 a year, and that is what is meant by the rent of the lease. The witnessing part says, "In consideration of rent and profits hereinafter reserved," and there is a distinction made between rent and profits. [His Lordship then read the clause of the lease stating the consideration as set out above, and continued:—] The question is, whether this is a case coming within Rule 5, Part II., Schedule I. of the General Order of 1882. [His Lordship read the rule as set out above, and proceeded:—] To entitle the solicitors to more than the remuneration in respect of the rent proper, they must make out that there was some further money payment or premium within Rule 5. If they admitted that they were not entitled to more than the remuneration in respect of the £80, they might have that. But they ask for the scale fee in respect of the rent and of shares, some of which have not been allotted, and they are not

entitled to it. Then they claim to make out another bill. [His Lordship then read the Taxing Master's answer to the objections to the taxation, and continued:—] That must be taken as accurate; and, under the circumstances, I do not think the Taxing Master was wrong in the course he took. I must dismiss the summons, with costs.

Chan. Div.
1888.

Solicitors: *Hasties & Crawford*; *H. C. Barker*.

In Re MACIVER, DECEASED.

MACIVER *v.* HARBISON AND OTHERS.

M. R.
1888.

April 24.

(*By permission, from 21 L. R. Ir. 241.*)

Practice—Costs—Three counsel—Inquiry at Chambers adjourned into Court.

The costs of three counsel will not be allowed, as between party and party, on an inquiry in Chamber adjourned into Court.

MOTION, on behalf of the defendants, to review the Taxing Officer's certificate of taxation.

The action was brought to administer the estate of Michael MacIver, deceased, who died in 1867. The plaintiff, Patrick MacIver, was a legatee under his will, and the defendants were his executors.

By order of the 17th June, 1886, an inquiry was directed before the Chief Clerk as to whether the defendants, in addition to the sums debited as received by them, had received a sum of £529, and the costs of said inquiry were reserved. This item the plaintiff sought to surcharge the defendants with. For the purposes of the inquiry skilled accountants inspected the account-books kept by the defendants for a number of years, and gave evidence regarding the investments and sales the defendants had made of testator's assets. The Chief Clerk, by order of the 12th May, 1887, ruled that defendants did not receive the said sum of £529, or any part thereof. On the requisition of the plaintiff, the matter was put in the Judge's list for the purpose of having his decision, and the

M. R.
1888.

case was afterwards adjourned into Court. Three counsel appeared for the plaintiff upon the hearing in Court, and the Master of the Rolls made an order affirming the decision of the Chief Clerk; but, in consequence of the question having arisen solely by reason of the lax manner in which the executors had kept their accounts, he directed that the costs of the inquiry before the Chief Clerk and himself should be paid by the defendants. These costs having been taxed, the defendants now applied for an order on the Taxing Officer to review his certificate in respect of items 74-6, being charges for a third counsel, and items 84-6, fees for consultation. The Taxing Officer had allowed the items objected to on the ground of the complexity of the case, and on the ground that it had been argued in Court.

Mr. Drummond, for the defendants, in support of the application, referred to the practice of the Court of Appeal, to hear only two counsel, and cited *Robb v. Connor* (1).

There was no appearance for the plaintiff.

THE MASTER OF THE ROLLS :—

Though the evidence in this case was voluminous, and the assistance of skilled experts had to be obtained, there was no question of law involved. It was adjourned into Court, not on account of there being a question of law, but for the convenience of the parties, and because a case of the kind might disarrange the course of business in Chambers. It was a mere question of account. It might be reasonable to engage two counsel, as a party having only one could not be sure of that one not being elsewhere engaged; but I cannot allow the costs of three without establishing a dangerous precedent. The application of the defendants must be granted.

Solicitor for the plaintiff: *Mr. D. M'Loughlin*.

Solicitors for the defendants: *Messrs. Glover & M'Guckin*.

*In re GALLARD ; Ex parte HARRIS.**Q. B. D.*
1888.*(By permission, from 21 Q. B. D. 38.)*

April 26.

Bankruptcy—Sale of Bankrupt's Property subject to Incumbrances—Solicitors' Remuneration Act, 1881, Gen. Ord. Sched. I., rr. 2, 9—Bankruptcy Rules, 1886, Pt. II., No. 7, Gen. Reg., r. 2.

Where the property of a bankrupt is sold subject to incumbrances, the solicitor of the trustee in bankruptcy is under Rule 9 of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881—and the Bankruptcy Rules, 1886, General Regulations, Part VIII., r. 2—entitled to a percentage on the gross amount of the purchase money and not merely on the amount realised from the equity of redemption.

APPEAL from the decision of the registrar of the Brighton County Court on the taxation of a bill of costs.

It appeared that a bankruptcy petition having been presented against the debtor, the first meeting of creditors was held in August, 1887, and was adjourned to October 6. In the meantime the debtor was by consent adjudicated bankrupt, and the official receiver became the trustee, and contracted to sell a house, part of the bankrupt's property, for £4,750, subject to a mortgage for £3,000. The sale was advantageous to the bankrupt's estate. The completion of the sale was fixed for October 6, but was subsequently adjourned until October 18. On October 6 the creditors appointed the appellant trustee of the bankrupt's estate, and on October 14 he received his certificate from the Board of Trade.

On October 18 the trustee completed the sale made by the official receiver. The transaction was carried out by two deeds, a reconveyance by the mortgagee and then a conveyance to the purchaser. The reconveyance was dated the 5th, but was not executed until October 18, when the mortgagee was paid off out of the purchase money, and the balance, £1,750, was paid to Harris.

Messrs. Griffiths & Eggar, the solicitors of the official receiver, carried in their bill of costs for taxation by the registrar and claimed commission on the whole of the £4,750, which was

Q. B. D.
1888.

objected to by the trustee. The registrar held that as Messrs. Griffiths & Eggar had acted for the official receiver in the matter of the sale, and had done all the work contemplated by the General Order under the Solicitors' Remuneration Act, 1881, they were, as solicitors of the vendors within the meaning of that order, entitled to the commission claimed. The trustee appealed.

Ante, p. 377.

S. Woolf, for the trustee. The rules applicable to this case are Rule 2 in Gen. Reg., No. 7, of Part II. of the Bankruptcy Rules, 1886, and sub-rules (a) 2 c. of Rule 2 in Schedule I. to Part I. of the Gen. Order under the Solicitors' Remuneration Act, 1881. The effect of those rules is to give the trustee's solicitor his percentage on the purchase money only so far as the bankrupt's estate receives. He is to be paid out of the "proceeds of sale" of the equity of redemption: *In re Grey's Brewery* (1). Here the equity of redemption realised but £1,750. If the contention of the respondents is correct, it will heavily tax the estate, as the bulk of it consists of properties in mortgage.

Muir Mackenzie, for the respondents. This was a sale subject to incumbrances, and part of the transaction was a reconveyance. The case is covered by the 9th rule in Part I. of Schedule I. to the Solicitors' Remuneration Act, 1881. The mortgagee's solicitor is not entitled to a percentage on any part of the purchase money, and therefore the case does not fall within the proviso in the Bankruptcy Rules.

Sidney Woolf, in reply.

CAVE, J. :—

I think this case very properly brought before me, as it presents some difficulty in construing the provisions of the Bankruptcy Rules. If the matter came only under the General Order to the Solicitors' Remuneration Act, 1881, it would be tolerably clear. Take the case of a mortgagor selling his property for £5,000 free from incumbrances; the solicitor gets his commission on the purchase money, £5,000. Why should not the solicitor get the same commission where the same estate is sold for £500

subject to incumbrances? It cannot make any difference whether the purchase-money goes wholly into the pocket of the owner or whether it is applied in payment of his debts. It is obvious this cannot in any way affect the time and trouble his solicitor will expend on the matter. Accordingly, Rule 9 of Schedule I. of the General Order to the Solicitors' Remuneration Act, 1881, provides that "where a property is sold subject to incumbrances, the amount of the incumbrance is to be deemed a part of the purchase money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption." So that, where a property is sold subject to incumbrances, the amount of the incumbrance is to be included in the purchase money in order that the solicitor may get his commission on the total amount. Thus it is clear that the percentage is to be reckoned on the total purchase money. That being so, turn to the Bankruptcy Rules, 1886, Gen. Reg., Part VIII., Rule 2: "In respect of business connected with sales, purchases, leases, mortgages . . . the solicitors' remuneration shall . . . be regulated by the General Order under the Solicitors' Remuneration Act, 1881, for the time being in force." If the rule had stopped there, it is clear that the solicitor would be entitled to commission on the gross amount of the purchase money, including therein the amount of the incumbrances where the property was sold subject to incumbrances; but the rule goes on to say—"provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under Schedule I., of the existing order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale." Now, where there is a state of things to which that last portion of the rule is applicable—*e.g.*, where a portion of the purchase money is chargeable by the mortgagee's solicitor with a percentage, it is clear that the percentage is not to be paid twice over, once to the mortgagee's solicitor and once to the trustee's solicitor, on any part of the purchase money; but that if the mortgagee's solicitor is entitled to a percentage then so far, the trustee's solicitor is not to have it. In other words, the estate is not to be charged with a double commission. That

Q. B. D.
1888.

is the meaning of the rule. As I am not thoroughly conversant with conveyancing business, I cannot answer off-hand whether such a case is or is not likely to occur, or whether the rule merely provides for the possible existence of some such case. But in this case it is admitted that the mortgagee's solicitor cannot be entitled to any percentage on any portion of the purchase money because he received notice to be paid off, and has had nothing whatever to do with the sale. That being so, the case does not come within this proviso to the Bankruptcy Rule. Reference was made to the concluding sentence of the rule, which provides that the trustee's solicitor's percentage shall be payable only out of the proceeds of the sale; but that clause only specifies the fund out of which the percentage is payable, and not the amount on which it is to be calculated. Thus, if the sale of a bankrupt's equity of redemption realises nothing, although the percentage will be calculated on the amount of the incumbrances, yet the trustee's solicitor will get nothing, for there are no "proceeds of sale" out of which it can be paid. I am clearly of opinion that the learned registrar was right, and that this appeal must be dismissed with costs.

Solicitors for appellant: *Ashurst, Morris & Co.*

Solicitors for respondents: *Griffiths & Co.*

O'MALLEY v. THE GUARDIANS OF THE POOR OF
THE KILMALLOCK UNION.

Ex. Div.
1888.

May 9.

(1888. B. No. 439.)

(By permission, from 22 L. R. Ir. 326.)

(Before PALLES, C.B., DOWSE, B., and ANDREWS, J.)

Practice—Costs—Writ of Summons—Tender of debt after issue but before service of writ.

A defendant cannot escape paying the costs of a writ of summons by tendering the amount sued for without costs before service, but after issue, of the writ.

MOTION for final judgment.

The action was brought to recover the sum of £20 4s. for goods sold and delivered. The writ of summons was issued on the 13th February, 1888, and was specially indorsed; and on the 16th February it was served on a person in the defendants' employment, but who was not the defendants' clerk of Union. On the 18th February, and before service of the writ was effected, the defendants sent to the plaintiff a cheque for the amount of the debt, but without costs. The plaintiff handed the cheque to his solicitor, who thereupon applied by letter to the defendants for the costs of the writ of summons. The defendants gave no answer to that application, and the cheque was returned to them. The writ of summons was served on the clerk of the defendants' Union on the 15th March. The plaintiff subsequently moved to mark final judgment for the amount claimed, together with the costs of the action and the motion; and the motion was grounded on an affidavit setting out the facts as stated, also verifying the cause of action and alleging there was no defence thereto. No affidavit was filed by the defendants.

D. F. Browne, in support of the motion :—

The plaintiff is entitled to judgment, with costs of the action. The issue of the writ is the commencement of the action, and not

Ex. Div.
1888.

the service : Leigh's N. P., vol. i., p. 162 ; Wentworth on Pleading, vol. iii., p. 177 ; *Briggs v. Calverly* (1).

M. J. Bourke, contra.

The COURT made an order for final judgment, together with the costs of the motion and of the action.

Solicitor for the plaintiff: *J. M'Carthy.*

Solicitor for the defendants: *G. Liston.*

KEARSE v. DOHERTY.

V. C.
1888.

(By permission, from 21 L.R. Ir. 381.)

June 12.

Costs—Abortive Sale—Amendment of conditions—Solicitor having carriage of proceedings—Practice.

In an action for dissolution of a partnership, by the decree on further consideration the plaintiff and defendants were declared entitled to their costs, and all subsequent costs, and the premises where the business was carried on, together with the stock-in-trade, were ordered to be sold. By a subsequent order the premises were directed to be sold out of Court. The solicitor for the plaintiff proceeded to sell, and the conditions of sale were settled at Chambers. By the second condition of sale it was provided that if the amount offered should be deemed insufficient, the vendors collectively reserved the right to withdraw the property offered for sale. It came to the knowledge of the solicitor for the plaintiff that M., one of the defendants, alone was in a position to buy the property, and, in order to prevent the sale being placed in his hands, he proposed to the other partners and to a mortgagee to alter the conditions of sale, so that any of the vendors might withdraw it. He failed to obtain a consent for this, and the sale having been advertised, the solicitor for the plaintiff altered the conditions of sale, acting under the advice of counsel, but without leave of the Court. The sale took place, and a price was offered which the Court deemed insufficient, and refused to confirm the sale. The plaintiff was then adjudicated bankrupt, and the further conduct of the proceedings passed over to the assignees. The solicitor for the plaintiff taxed his costs, and the Taxing Officer disallowed the items for preparing and printing the conditions of sale, and for the advertisements :

Held, on appeal from the Taxing Officer, that the solicitor for the plaintiff was, under the circumstances, entitled to the costs, notwithstanding the irregularity in altering the conditions without leave of the Court, as the costs were *bona fide* incurred.

SUMMONS on behalf of Richard Davoren, solicitor for William Ivens Kearse, the plaintiff in the action, by way of appeal from the decision of Mr. Mathews, Taxing Officer, upon the taxation of the bill of costs of the plaintiff, disallowing certain items for preparing and printing conditions of sale, and preparing postings and advertisements of the action.

The action was brought for the dissolution of the partnership between the plaintiff and the defendants, James Doherty, John M'Birney, and the executors of the late David M'Birney, and to have the necessary accounts taken.

The case came on for hearing on further consideration of the Chief Clerk's certificate on the 20th November, 1885, when the Court, amongst other things, directed the property and premises to be sold as a going concern, and declared the plaintiff and defendants entitled to their costs, and also to their subsequent costs. On the 8th November, 1886, an order was made that the premises should be sold subject to the approbation of the Judge.

Mr. Davoren then prepared the abstract of title, when it turned out that there was a flaw in the title, and the case was submitted to the conveyancing counsel of the Court for his advice. The opinion of the counsel was that the sale could not be carried out in Court, and an application was accordingly made to the Court on the 21st March, 1887. By order of that date the Vice-Chancellor directed that the sales be had out of Court, subject to plaintiff's conditions of sale, already settled at Chambers, and declared the plaintiff entitled to his costs, as costs in the action.

Mr. Davoren then proceeded to carry out the sale, the conditions having been settled at Chambers. The second condition of sale was as follows:—

“2. No person is to advance less than £10 at each bidding, and no bidding shall be retractable. The vendors individually reserve the right to bid, and in case the amount offered shall be deemed insufficient, they collectively reserve the right to withdraw the property without sale.”

The sale was advertised for the 20th July, 1887, when it came to the knowledge of Mr. Davoren that his client was not in a position to become a purchaser, and that practically Mr. John M'Birney, one of the defendants, was the only person who could

V. C.
1888.

buy the property. He at once communicated with the solicitors for the other partners, and for the National Bank, asking them to alter the conditions of sale, and to settle them so that the sale would not be at the mercy of one partner. This proposal was rejected, and as the sale could not be postponed, Mr. Davoren, acting under the advice of counsel, altered the latter clause of the second condition of sale in the following way:—

“The vendors individually reserve the right to bid, and in case the amount offered shall be deemed by any of the vendors insufficient, the auctioneer shall withdraw the property without sale.”

The only bidder at the auction was Mr. John M'Birney, and the amount of his bid was £18,000, which he subsequently increased to £20,000.

On the 4th August, 1887, Mr. M'Birney applied to the Court to confirm the sale. The Court, being of opinion that the price was inadequate, refused the application. Subsequently to the sale, the plaintiff was adjudicated bankrupt, and the conduct of the subsequent proceedings, including the carrying out of the sale, passed to the assignees. Mr. Davoren then taxed his costs, when Mr. Mathews disallowed a number of items, amounting in the aggregate to the sum of £102, which represented exclusively the costs for printing and preparing the conditions of sale and advertising the auction. He allowed the costs for preparing the abstract of title, as it would be ready for use at the subsequent sale; but the conditions, particulars, and advertisements of the sale, which had proved abortive, were disallowed.

On the 26th March, 1888, the plaintiff, pursuant to Ord. X., R. 31, of the Orders of April, 1878, delivered objections to the disallowances made by the Taxing Officer, and applied for a review of the taxation. The Taxing Officer reviewed his taxation, and adhered to his ruling. The plaintiff then appealed.

Mr. Kenny, Q.C., in support of the appeal, contended that a solicitor having carriage of a sale, directed by an order of the Court, was entitled to the costs of a sale, which proved abortive, as of course, unless it could be shown that he acted *mala fide* or that the sale proved abortive owing to his conduct. That it

could not be contended that the sale had failed owing to Mr. Davoren having altered the condition of sale; that that alteration was made *bona fide* to prevent the property going at an under-value, and was a necessity.

V. C.
1888.

Serjeant Jellett, Q.C., for Mr. John M'Birney, contended that the alteration of the condition of sale must have affected the sale. On the face of the transaction the position of the plaintiff was anomalous, because his character as a vendor was inconsistent with his position as a party fixing a reserved price.

Mr. Oulton, for the assignees of Kearse, supported the objection of Serjeant Jellett to the costs, so far as regards the posting for sale and the advertisement, but did not object to the plaintiff being allowed the costs of the conditions of sale, as the conditions would have been of use at a subsequent sale.

The VICE-CHANCELLOR :—

The costs, the subject of this appeal, are part of the costs to which the plaintiff claims to be entitled under the order of 21st March, 1887. There would be no doubt, but for the circumstances which afterwards happened, that these were costs properly and necessarily incurred. It was Mr. Davoren's duty to settle the conditions of sale and to advertise the sale, and he did so. By the conditions, as they stood up to the eve of the sale, the property would, under the circumstances of the case, have been placed in the power of Mr. John M'Birney. He was asked to join with the other parties interested in altering the conditions of sale, so as to guard against this risk, but he declined to do so. He would, consequently, be in a position to have the property knocked down to him at his own price. There was one way of guarding against the danger of the property going at an under-value—namely, to fix a reserved price; but to this, by the letter of the 16th July, 1887, Mr. M'Birney also objected, and thus, at the last moment, he refused his consent to the only safeguard against the property being sold at an under-value. Under these circumstances, Mr. Davoren adopted a course which he was not regular in taking, but which was the only course to prevent the

V. C.
1888.

property being sacrificed. All the expense which he had incurred was incurred *bona fide*, and he would clearly be entitled to charge it in his costs, unless he has disentitled himself to do so by adopting a course which was unwarranted. I am of opinion that he acted *bona fide* for the protection of the assets, and that the course adopted by him was justifiable under the circumstances, and I hold that he is entitled to the costs; but I think it right to add that the Taxing Master was warranted in refusing to allow them without the order of the Court.

Solicitor for the plaintiff: *Mr. Davoren.*

Solicitor for the assignees of Kears: *Mr. Hayes.*

Solicitor for Mr. John M'Birney: *Messrs. Larkin & Co.*

Appeal.
1888.

June 5.
August 1.

GRIFFITHS v. PATTERSON.

(By permission, from 22 L. R. Ir. 656.)

(Before LORD ASHBOURNE, C., and FITZGIBBON, BARRY,
and NAISH, L.JJ.)

(1888—A. No. 300.)

Practice—Costs—Original action and counterclaim—Not more than £20 recovered in original action—Rules of April, 1878, Order VIII., Rule 3.

In an action for work and labour done, the plaintiff recovered a verdict for £20 and costs on his claim, and also obtained a verdict with costs on a counterclaim for board and lodging:

Held (affirming the judgment of the Queen's Bench Division), that he was entitled to the full costs of the counterclaim, and, in addition thereto, the costs of the original action, taxed pursuant to Order VIII., Rule 3, of the Rules of April, 1878, in so far as the same were not included in the costs of the counterclaim.

Ruth v. Keefe (20 L. R. Ir. 30) disapproved of.

APPEAL from an order of the Queen's Bench Division, dated the 14th May, 1888 (1), made on a motion by the defendant for an order that the plaintiff's costs be referred back to the Taxing

(1) *Infra*, p. 657.

Master to be retaxed on the principle that the plaintiff should be allowed half the general costs of suit and the excess only to which his costs had been increased by reason of the defendant's counterclaim.

Certain items in the bill were referred to in the notice of motion, the taxation of which was specifically appealed from, and which appear sufficiently from the judgment of FitzGibbon, L.J.

The action was brought to recover £29, balance due for work and labour, and by counterclaim the defendant claimed to recover £36 15s. from the plaintiff for board and lodging and necessities and goods supplied. It was tried on the 10th June, 1885, and resulted in a verdict for the plaintiff for £20 on his claim, and also for the plaintiff on the counterclaim.

The application before the Queen's Bench Division was heard before Harrison, Johnson, Holmes, and Gibson, JJ., when the following order was made:—

“THE COURT doth declare that the costs should be taxed, on the principle that the plaintiff is entitled to the full costs of the defendant's counterclaim, and, in addition thereto, the costs of the original action, taxed pursuant to Order VIII., Rule 3, in so far as the same are not included in the costs of the counterclaim; and the defendant not requiring that the items objected to be referred back to taxation on the said principle, it is ordered that there be no rule made on this motion, and that the defendant do pay to the plaintiff the sum of £4 4s. costs thereof.”

S. L. Brown, for the appellant, argued that the principle laid down by the Queen's Bench Division was wrong, and cited *Long v. Anle*, p. 332. *Fitzgibbon* (1) and *Ruth v. Keefe* (2).

E. Cuming, *contra*, cited *Shrapnel v. Laing* (3), and argued in support of the Taxing Master's ruling on the items objected to.

LORD ASHBOURNE, C.:—

Aug. 1.

This is a case raising an interesting point as to costs in actions where a counterclaim has been brought. The facts upon which the question turns are short. The action was brought to recover £29 balance of an account for work and labour. Defence was taken, and a counterclaim also made for £36 for board and lodging. The plaintiff obtained a verdict for £20, with costs, which under

(1) 20 L. R. Ir. 12.

(2) Ibid. 30.

(3) 20 Q. B. Div. 334.

Appeal.
1888.

the Irish Judicature Act and rules would not entitle him to the costs of attendances, and to only half the costs of other items. The verdict was for the plaintiff on the counterclaim also with costs. On taxation the items for attendances at the trial, &c., and other items which were necessarily incurred in the action, and were equally necessary in the counterclaim—but of which the plaintiff would have been wholly or in part deprived if regarded as costs in the action—were allowed in full against the defendant as costs of the counterclaim. Under these circumstances, the defendant brought the matter under the notice of the Queen's Bench Division, and moved the Court, challenging the principle on which the taxation proceeded before the Taxing Master. His motion was by way of appeal from the Taxing Master, and for an order that certain items in the bill of costs be referred back to him to be taxed, on the principle that the plaintiff was to have allowed him half the general costs of suit, and the excess only to which his costs have been increased by reason of the counterclaim: in other words, he asked for an order, practically, in the terms of the Chief Baron's order in *Ruth v. Keefe* (1). The Queen's Bench Division, after argument, made an order in the following terms, which are important:—"The Court doth declare that the costs should be taxed, on the principle that the plaintiff is entitled to the full costs of defendant's counterclaim, and in addition thereto the costs of the original action taxed pursuant to Order XIII., Rule 3, in so far as the same are not included in the costs of the counterclaim, and the defendant not requiring that the items objected to be referred back to taxation on the said principle, it is ordered that there be no rule made on this motion, and that the defendant do pay to the plaintiff the sum of £4 4s. costs thereof."

By that order the Queen's Bench Division declined to send back the items to the Taxing Officer for retaxation, on the principle asked for by the defendant, but laid down instead the principle I have just read. The defendant has appealed to us, not questioning any particular items, but contending that the principle laid down by the Queen's Bench Division is wrong, and that the principle established by *Ruth v. Keefe* (1) is right. The matter accordingly is presented to us as a matter of importance, involving a difference

(1) 20 L. R. Ir. 30.

Appeal.
1888.

of opinion between the Queen's Bench and Exchequer Divisions. The defendant was so dissatisfied with the order of the Queen's Bench Division that he declined to avail himself of any retaxation under it, and this appears from the words, "and the defendant not requiring that the items objected to be referred back to taxation on the said principle." No question whatever of items or apportionment of items was discussed before us. The question submitted to us on the part of the defendant is whether we should affirm the principle laid down by the Queen's Bench Division, or adopt that contained in his notice of motion. We have ascertained, from a communication made by the Taxing Department here to Master Pollock, in answer to an inquiry made at our suggestion, what the practice in similar cases in England is. Master Pollock's reply is in the following words:—

"By the rules of our Supreme Court, a plaintiff who recovers £20, and not more than £50, is entitled to no more costs than he would have been entitled to if he had recovered the same amount in the County Court. This is analogous to the Irish rule which, under these circumstances, I learn, deprives him of the costs of certain attendances. So that, though the penalty is different, the same point arises with us, viz., whether the penalty is to be extended by also depriving the plaintiff of costs which he has incurred in successfully defending himself against a counterclaim of the defendant. We have no Rule or Order so extending it, and when the case occurs here the masters tax in the same way that the master in Dublin appears to have done. Had the defendant, instead of counterclaiming, commenced a separate action, and failed, he would have had to pay a larger amount of costs.

"GEORGE F. POLLOCK.

"8th June, 1888."

So far as that letter goes, it supports the view taken by the Taxing Officer here. After the best consideration I can give to the matter, I have come to the conclusion that the principle laid down by the Queen's Bench Division is correct, and that therefore this appeal should be dismissed, with costs.

Appral.
1888.

FITZGIBBON, L.J. :—

I agree that the principle laid down by the Queen's Bench Division is in terms correct, or is at least capable of a correct interpretation; but I regret that the course of the argument, and the mode in which the bill of costs in question has been actually taxed, appears to me to make it necessary that I should state the grounds of my judgment at some length, lest our decision should be understood to sanction a taxation which I do not believe to be correct, and which is not in accordance with the principle stated by the Queen's Bench, as I understand it. The Queen's Bench did not sanction the actual taxation, for the defendant was, by the order appealed from, offered a retaxation, which he refused. In this he may have been well advised, as the amount which would have been struck off would probably not have been worth the expense and trouble of going back to the Taxing Master, unless the principle of *Ruth v. Keefe* (1) was to be adopted, and therefore he appealed, although the actual taxation of which he complained was not affirmed. Here we cannot renew the offer of retaxation, and can only dismiss the appeal if we think the principle is correctly stated in the order appealed from.

Mr. Cuming, however, referred in detail to the items allowed, and endeavoured to sustain the Taxing Master's rulings, and because he did so, I feel it necessary to disclaim his construction of the principle stated by the Queen's Bench, and to say that the taxation in this case conflicts, in my opinion, with the orders and rules, and also with the decision in *Shrapnel v. Laing* (2). I agree that the rule laid down by the Chief Baron in *Ruth v. Keefe* (1) cannot be maintained. The complicated process of first taxing the plaintiff's costs of both claim and counterclaim on the assumption that he was entitled to both, then taxing his full costs of the action on the assumption that there was no counterclaim, and then deducting the one sum from the other, and giving judgment for the difference, would proceed on artificial assumptions, and would result, as I think erroneously, in depriving the plaintiff of the whole amount of every item which could be included in the costs of the action, although the same

(1) 20 L. R. Ir. 30.

(2) 20 Q. B. Div. 334.

item, in whole or in part, was also necessarily incurred in bringing the counterclaim to an issue. In other words, the plaintiff on that principle would get *no credit whatever* on account of his successful defence of the counterclaim, for any costs of that defence which would have been incurred in the action if there had been no counterclaim.

It seems to me that wherever there are claim and counterclaim, and the plaintiff succeeds on both, the bill should be taxed once and for all right through, ascertaining the sum to be allowed on each item, whether on foot of the claim or of the counterclaim. Each item must be an item which belongs either (a) wholly to the claim, or (b) wholly to the counterclaim, or (c) to both. In the last case its amount may or may not be increased by the existence of the counterclaim. If of fixed amount, and for something *necessary to either proceeding if it stood alone* it is what Lord Esher in *Shrapnel v. Laing* (1) calls "a common item," or it may be something, such as counsel's fee, which, whether increased or not by the existence of the counterclaim, nevertheless represents the cost of work done on both claim and counterclaim. Taxing the costs in the ordinary way, once and for all right through, all the items in class (a) should be set down to the original action alone; all the items in class (b) to the counterclaim alone, and whenever the result, owing to the amount recovered or otherwise, makes a distinction in amount or liability between the costs of the claim and of the counterclaim, each item in class (c) must, in my opinion, be apportioned between the claim and counterclaim. All rules and enactments limiting the costs with regard to the amount recovered, or otherwise, will take effect, not only with regard to all the items in class (a), but also to so much of the items in class (c) as may be apportioned to the claim. But I think the Taxing Master cannot charge the whole of any common item to either claim or counterclaim, nor can a plaintiff deprived of costs on his claim get back anything of which he has been so deprived, merely because the defendant has pleaded a counterclaim.

In *Saner v. Bilton* (2) both claim and counterclaim were dismissed with costs. There the plaintiff was ordered to pay the

(1) 20 Q. B. Div. 334.

(2) 11 Ch. Div. 416.

Appeal.
1888.

full costs of the original action, which was "treated as if it stood by itself," but the reason given was that the plaintiff had first commenced litigation, and that it was impossible to say how far the counterclaim case would have been agitated if he had not begun that litigation, and this reason seems to me equally to prevent the present plaintiff from indirectly compelling the defendant to pay as costs of his counterclaim what the Acts and Orders have forbidden the plaintiff to recover on a judgment for so small an amount as £20.

In *Shrapnel v. Laing* (1) each party succeeded, the plaintiff recovering £50 on the claim and the defendant £80 on the counterclaim; and Lord Esher says:—"The only contention was that because the defendant succeeded in recovering more on the counterclaim than the plaintiff recovered on the claim they ought to have the whole costs of the action, leaving the plaintiff the costs only of the issues on which he succeeded." . . . He says:—"The claim and counterclaim are to be treated as independent actions." . . . "The costs of the claim are to be taxed as though the claim were an action by itself." . . . "The costs of the counterclaim must be taxed as though it were a wholly independent action." "The Taxing Master will then have two sums to deal—the amount at which the costs of the claim have been taxed, and the amount at which the costs of the counterclaim have been taxed—and his allocatur should be made for the balance." . . . But he says:—"Although the claim and counterclaim are to be treated as independent actions, the means of arriving at a conclusion on each may be *common to both*. Thus, if the same counsel appears, and his instructions are contained in one brief, that brief is *treated by the Taxing Master as two*—so much of it as relates to the claim will belong to the claim, and so much of it as relates to the counterclaim will belong to the counterclaim. In the same way, if one fee be marked on the brief, it will be treated as two fees." Accordingly it was held that neither plaintiff nor defendant was entitled to the full amount of any such items. The Taxing Officer in the present case, on the contrary, not only allowed in full against the defendant all the items which Lord Esher calls "common items"—

(1) 20 Q. B. Div. 334.

i.e., "items in respect of which both parties get the advantage," but he also omitted to divide items which Lord Esher holds should be "treated as two." He allowed in full against the defendant the solicitor's attendances at the trial, the full ordinary counsel's fee, the full refresher, the charges for the draft reply and brief; the fees on the verdict, and some others. It seems to me that, on the authority of *Shrapnel v. Laing* (1), all these items should have been divided, and that the amounts chargeable against the defendant in respect of so much of them as was apportioned to the claim, should have been reduced in accordance with the rules limiting the costs on a verdict of £20. What that proportion should have been was for the Taxing Master to determine; but our decision in *Ryan v. Fraser* (2) would go far to show that the *Ante*, p. 256. larger part should have been attributed to the claim. In that case there was a liquidated demand and a cross liquidated demand sued for by way of counterclaim. The plaintiff on the claim recovered a sum exceeding £20, but the defendant recovered on the counterclaim a sum which, when deducted from that recovered by the plaintiff, reduced the balance below £20. We held that one judgment only should be entered, viz., a judgment for the plaintiff for the balance only, and the parties being resident in the same civil-bill jurisdiction, we held that the plaintiff was entitled to no costs of the claim, nor the defendant to any costs of the counterclaim. There the claim was for work and labour, and the counterclaim was for goods sold and for rent; here the claim is for work and labour, and the counterclaim is for the board of the plaintiff while doing the work. It is only because a considerable sum had been paid on account before action that the claim for board, unfortunately for the defendant, was set down as exceeding the balance claimed for wages, otherwise it would have been a mere set-off. The defence to the counterclaim was that the wages were fixed on the terms that the plaintiff was to get his keep for nothing while engaged by the defendant, and therefore the matter of the counterclaim was actually taken into account in reducing the verdict to £20. I cannot imagine that the counterclaim made any substantial difference in the expense of the action, yet the

(1) 20 Q. B. Div. 834.

(2) 16 L. R. Ir. 253.

Appeal.
1888.

result of the taxation is that a substantial sum above "half-costs" has been awarded to the plaintiff as for the costs of the counterclaim, though under Order VIII., R. 3, 1878 (Eiffe, 697), he ought to have got "half costs" only, with whatever *extra* expense the counterclaim may have entailed on him. While the order made by the Queen's Bench Division was right, and we have no alternative except to dismiss the appeal, I feel strongly that this bill of costs has not been correctly taxed, and I have felt it necessary to say so, lest that bill should hereafter be relied on to show that we had sanctioned a taxation inconsistent with *Shrapnel v. Laing* (1), and which I believe the Queen's Bench Division did not intend to sanction.

BARRY, L.J.:—

I concur in thinking that this appeal should be dismissed, and I am not in the least alarmed lest this case should be quoted as a precedent for the way in which the items of this bill of costs were dealt with by the Taxing Master. There were two principles of taxation—one laid down by the Exchequer Division, and the other by the Queen's Bench Division. An appeal has been brought contending that the Exchequer Division is right, and the Queen's Bench Division is wrong. All we are doing now is to say that we affirm the principle laid down by the Queen's Bench Division. I decline to volunteer to undertake a duty which belongs to the Taxing Master, and it should be remembered that the appellant declined, on the invitation of the Court below, to take the items objected to back to the Taxing Master for retaxation. I give no opinion on matters of detail, which were not argued in the Court below or in this Court.

NAISH, L.J.:—

In my opinion the order appealed from is correct, and the appeal should be dismissed.

The order declares that the costs should be taxed on the principle that the plaintiff is entitled to the full costs of defendant's counterclaim, and in addition the half costs of action, so far as the latter are not included in the costs of the counterclaim.

This being what the Court below has declared, the defendant contends that this principle is wrong, and that the costs should be taxed upon the principle that the plaintiff should have only half the general costs, and in addition the amount by which the costs have been increased by reason of the counterclaim. On this principle, if the plaintiff, being resident in the same civil-bill jurisdiction as the defendant, had recovered under £20, but succeeded on the counterclaim, the costs to which he would have been entitled would have been those items only which were exclusively applicable to the counterclaim, and he would lose all the items of costs which were applicable to the counterclaim as well as to the claim, as, for instance, the fee paid counsel on his brief, and the solicitor's fee for attending in Court on the trial. On the best consideration I can give the question, this principle appears to me to be incorrect.

In the case of *Stooke v. Taylor* (1), the plaintiff recovered £35 on his claim, and the defendant £20 on his counterclaim, leaving the balance recovered by the plaintiff £15, and the Court of Queen's Bench held that under those circumstances the plaintiff's costs were not to be awarded merely as though the plaintiff had recovered £15, but as though he had recovered £35, and that the plaintiff was entitled to the costs on his claim, and the defendant to his costs on the counterclaim; and the Chief Justice Cockburn, in his judgment, at pp. 573-574, describes a counterclaim as a thing which without being in form a cross-action is so in substance, and makes this the basis of his judgment. Again, in *Winterfield v. Bradnum* (2), Brett, L.J., at p. 326, says:—"A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is, that they are wholly independent suits which, for convenience of procedure, are combined in one action. I know that a practice has arisen that if the counterclaim overtops the plaintiff's claim, judgment is entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties."

In those cases, one in the Queen's Bench Division and the other in the Court of Appeal, the Court, for the purposes of awarding

(1) 5 Q. B. Div. 569.

(2) 3 Q. B. Div. 324.

Appeal.
1888.

costs, treated claim and counterclaim as being action and cross-action. It appears to me to be inconsistent with this principle to take up a particular item common to both, as for instance the fee for the solicitor's attendance in Court, and say, as we are asked to say here, that this item must be wholly attributed to the claim. The principle I have referred to treats the parties, plaintiff and defendant, as being both, so to say, promovents, and likewise defendants, and there is no reason why we should then attribute a common item to one of the proceedings exclusively.

Again, where a defendant sets up a counterclaim, the more especially in a case like the present, when he wholly contested the plaintiff's claim, and sought the judgment of the Court against him for a demand of his own, I fail to see why on any principle of fair play or justice he should stand in a more favourable position than his adversary.

On these grounds, I think the contention of the defendant in the present case was not well founded. The contention which I have mentioned was the only one put forward by the defendant, both in the Court below and here. We were told we were to decide which of two modes of taxation—one adopted in the Exchequer Division, the other in the Queen's Bench Division—was right. No middle course was suggested; and though the defendant got the option of going back to the Taxing Officer, he deliberately refused to do so.

But a suggestion has been made by Lord Justice FitzGibbon that, by simply affirming the decision of the Queen's Bench Division, we might be afterwards quoted as affirming the decision of the Taxing Master on every item in the present bill.

Now, as regards this, in the first place, I fail to find any precedent for the Court of Appeal proceeding to tax the items in a bill of costs which were not before the Court below; in the second place, such taxation was not sought by the party appealing. Furthermore, I am not satisfied that in a case such as the present, where the plaintiff succeeds both on claim and counterclaim, that common items are to be divided, as Lord Justice FitzGibbon has stated. If there had been no claim, and the defendant had sought to recover the £36 15s., he would have had to pay the plaintiff the full costs of his proceeding. Why he is to be now relieved because

this proceeding is combined with a claim by the plaintiff in which he has succeeded, and which claim has not entailed any extra expense in respect of the counterclaim, I fail to see.

Appeal.
1888.

I can quite understand if the question came to be one of dividing costs as between the plaintiff and defendant, when the plaintiff got his costs of the claim, and the defendant his costs of the counterclaim, or *vice versa*, it would be necessary for the purpose of adjusting the rights of the parties to divide the common items. That was what was done in *Baines v. Bromley* (1), and *Shrapnel v. Laing* (2) was a case of a similar character. I do not consider the principle applicable to a case where the one party has succeeded both on claim and counterclaim.

Decision below affirmed.

Solicitor for the plaintiff: *James Henry.*

Solicitor for the defendants: *Charles O'Connor.*

In the Matter of the BELFAST WATER COMMISSIONERS;
Ex parte ORR. SAME; *Ex parte* USHER. SAME; *Ex parte*
CONNOR.

M. R.
1888.
June 13.

(*By permission, from 21 L. R. Ir. 342.*)

Lands Clauses Act, 1845—Railways (Ireland) Acts—Conveyance to promoters of undertaking—Costs of—One solicitor acting for several clients—Bill of costs—Taxation items—Practice.

The practice on the taxation of the costs of, and incidental to, the conveyance of lands to the promoters of an undertaking under the Lands Clauses Act, 1845, and Railways (Ireland) Acts, is now regulated by sect. 12 of the Railways (Ireland) Act, 1864, and not by sect. 83 of the Lands Clauses Act, 1845.

Where one solicitor is employed by several clients for the purposes of such conveyances, he is not entitled to furnish separate bills of costs, charging taxation items in respect of each bill.

THE Belfast Water Commissioners, in pursuance of the powers conferred upon them by the Belfast Water Acts, 1840-1884, which incorporated the Lands Clauses Act, 1845, and the Railways (Ireland) Acts, 1851-1864, purchased the interest of the

(1) 6 Q. B. Div. 691.

(2) 20 Q. B. Div. 334.

M. R.
1888.

tenants on part of the estate of Sir Richard Wallace, in the neighbourhood of the town of Belfast, for the purpose of their undertaking. In the proceedings before the arbitrator, twenty-nine of the said tenants were represented by one firm of solicitors, Messrs. D. O'Rorke & Sons, Belfast, and they were awarded altogether nearly £5,000 by way of compensation for their interests in the lands so taken. Subsequently proper conveyances were executed by the tenants to the said Commissioners; and, again, Messrs. O'Rorke acted for the twenty-nine tenants in the investigation and deduction of title. On the 4th May, 1887, Messrs. O'Rorke delivered twenty-nine bills of costs of and incidental to the said conveyances at the Dublin office of Messrs. M'Lean, Boyle & M'Lean, solicitors for the Commissioners, who refused to recognise or pay any costs except such as had been ascertained on a requisition sealed by the Commissioners, and intimated that the Commissioners would only seal one such requisition. Messrs. O'Rorke thereupon lodged their twenty-nine bills of costs in the taxing office, and issued summonses to have them taxed on requisitions signed by each of their clients, and naming Messrs. M'Lean, Boyle & M'Lean to attend without obtaining their consent. The Master refused to tax each bill separately.

Messrs. O'Rorke then filed three petitions, under section 83 of the Lands Clauses Act, 1845, on behalf of three of their clients, praying for orders that it might be referred to the Taxing Master to tax petitioners' costs of and incidental to their conveyances of their lands to the Belfast Water Commissioners.

Mr. W. Long for petitioners:—

When the promoters of the undertaking and the persons entitled to these costs do not agree as to the amount thereof, the Lands Clauses Act, 1845, sect. 83, provides that costs shall be taxed by one of the Taxing Masters of the Chancery Division, upon an order of the Court, to be obtained upon petition in a summary way. This firm of solicitors should be treated on the same principles as would be applied if the twenty-nine tenants had employed separate solicitors.

Mr. Bewley, Q.C., contra :—

M. R.
1888.

Section 83 of the Lands Clauses Act, 1845, is superseded by sect. 12 of the Railways (Ireland) Act, 1864. This section, read with sect. 21 of the Railways (Ireland) Act, 1851, shows that the proper procedure was a petition to compel the Commissioners to seal requisitions. They are, and always were, willing to seal one requisition, but they object to paying the twenty-nine separate sets of taxation items. It would be otherwise if different solicitors had been employed. See *In re Nicholls's Trust Estates* (1); *Midland Great Western Co., Ex parte Lord Dillon* (2); *In re Gore Langton's Estate* (3).

THE MASTER OF THE ROLLS :—

These petitions of Messrs. O'Rorke had been misconceived. They do not ask for an order to compel the Belfast Water Commissioners to give requisitions to tax these bills of costs, but for an order to the Taxing Officer of this Court to tax them under sect. 83 of the Lands Clauses Act, 1845. Now, if this were the proper course to take, when the parties do not agree, it is manifest that Messrs. O'Rorke were wrong in attempting to get these bills taxed on the requisition of their clients. It was a curious proceeding for them to sign requisitions to tax, naming Messrs. M'Lean & Boyle to attend. However, they refused to attend, alleging that the bills of costs had not been properly delivered to them, and that these costs should be taxed on a single requisition under the seal of the Commissioners. Coming to the point of substance, it appears the twenty-nine tenants on Sir Richard Wallace's estate employed Messrs. O'Rorke in this matter. Their proper costs in respect of the conveyances to the Commissioners amounted to £163 1s. 2d., but there is added no less a sum than £93 13s. 9d. for taxation items, making a total of £256 14s. 11d. These items are made up of twenty-nine charges of between £3 3s. and £3 18s. 6d., for attending on taxation. Mr. Long's argument is that Messrs. O'Rorke are entitled to these charges, because the Commissioners would have had to pay these items if these twenty-nine tenants had employed different solicitors; and they should not be in a better position because they happened only

(1) 35 L. J. Ch. 516.

(2) 9 L. R. Ir. 16.

(3) L. R. 10 Ch. Ap. 328.

M. R.
1888.

to employ one. The true principle is that pointed out by V.-C. Woods in *In re Nicholl's Trust Estates* (1), and followed in this country by the Vice-Chancellor in *In re Midland Great Western Railway Co., Ex parte Dillon* (2). The policy of the law, where property is taken from owners against their will, by a public body, is to compel that public body to compensate them for the property so taken, and also to pay their costs in obtaining that compensation; but that is a very different thing from heaping up costs against such a public body, nominally on behalf of the owners, but really for their solicitors, and in respect of which no services were rendered either to the owners or to the Commissioners. This case is governed by the Irish Railways Act of 1864, and not by the Act of 1845. Sect. 12 of the former Act provides that "in all cases where costs of conveyances shall be payable by the Company, such costs shall be taxed by one of the Taxing Masters of the Court of Chancery in Ireland upon the requisition of such Company; and all the provisions of any Act of Parliament, and all rules and regulations of the Courts of Law and Equity in Ireland relating to the taxation of costs shall be deemed applicable to such costs so payable by the Company in like manner in all respects as if the said Company were directly chargeable therewith." Only upon the requisition of the Commissioners can these costs be taxed. They refuse to seal twenty-nine such requisitions. The proper course for the petitioners, in any case, was to petition for an order to compel the Commissioners to give the requisition. If that had been done I would have held that one requisition was enough.

I shall therefore make no rule on these three petitions; the costs must be paid by the petitioners; but as there were only one set of affidavits and one hearing, there will be only one set of costs.

Solicitors for petitioners: *Messrs. O'Rorke & Sons.*

Solicitors for Belfast Water Commissioners: *Messrs. M'Lean Boyle & M'Lean.*

In the Matter of THE SOLICITORS' REMUNERATION ACT, 1881; *Ex parte* FERGUSON & CO., to MICHAEL BUCKLEY, LATE A SOLICITOR OF THE SUPREME COURT OF JUDICATURE IN IRELAND.

M. R.
1888.

July 23.

(*By permission*, from 21 L. R. Ir. 392.)

Solicitor and Client—Taxation of costs—Deducing title—Furnishing searches—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), Schedule I., Parts I. and II.

To entitle a solicitor to the percentage charges under Schedule I., Parts I. and II. of the General Orders under the Solicitors' Remuneration Act, 1881, he must have deduced title to the premises, and of such deduction of title furnishing searches is an essential part.

In re Lacey & Sons (25 Ch. Div. 301) followed.

Ante, p. 238.

SUMMONS to review taxation by Charles Buckley and Daniel Murray, executors of Michael Buckley, deceased.

The firm of Dickson and Ferguson, of Banbridge, being indebted, among others, to the National Bank for over £5,000, for which sum the said bank had the security of an equitable mortgage of the deeds of the firm, Mr. Ferguson, one of the partners of the firm, and at the suggestion of the bank, started a new Limited Liability Company, to take over the factory at Banbridge from the firm, the bank to take debentures of the new Company, as a security for their debt. Mr. Michael Buckley, solicitor, was instructed by Mr. Ferguson, to prepare the necessary documents for carrying out this arrangement. Accordingly he prepared an agreement for sale, dated the 1st November, 1883. One clause thereof provided that the vendors should, at their own expense, deduce and show a good title, but that the title of the grantor and lessor, under whom the vendors held should be admitted. Another clause provided the vendors, at their own expense, should satisfy all requisitions and remove all reasonable objections of the purchaser, so far as they might be able to satisfy or remove the same. The vendors were Messrs. Dickson and Ferguson, the purchaser the new Company of Ferguson and Co. Mr. Buckley acted for both parties. Mr. Ferguson held ten acres at Banbridge, under a lease for 999 years, and thirty-seven acres under a fee-farm grant

M. R.
1888.

from the same landlord. It was the lease which had been deposited as security with the National Bank. Out of these holdings, five acres of the leasehold and one acre of the freehold had been set apart as the joint property of Messrs. Dickson and Ferguson, and they agreed to demise these (being the factory) premises to the new Company for a term of 950 years, at a yearly rent of £41 6s. 6d., and in consideration of a fine of £5,518.

On October 18th, 1883, Mr. Buckley attended at the bank and examined the lease there deposited. On the 6th May, 1884, he sent to the bank for approval a draft lease from the firm to the Company, a draft form of debenture, a draft mortgage for £5,000 from the Company to the bank collaterally securing the debentures, the agreement for sale of the 1st November, 1883, a copy of the memorandum and articles of association of the new Company, and a certificate of its incorporation; also a copy of the fee-farm grant; and he pointed out that as mortgagees they had themselves possession of the original lease. On the 8th May, Messrs. Wallace and Co., as solicitors for the bank, wrote to Mr. Buckley, pointing out that as Mr. Ferguson had mortgaged the freehold to Messrs. Richardson, they would be necessary parties to the new lease; also indicating that the said lease should give the new Company a power of distress over the premises not thereby demised, in case Mr. Ferguson allowed the head-rents to fall into arrear; that the debentures should be a first charge on the property of the Company; also other minor details. On the 27th May, Messrs. Wallace acknowledged the receipt from Mr. Buckley of a draft reconveyance of the Richardson mortgage, and returned the same approved; and they pointed out that there was another mortgage to the Commissioners of Public Works. A considerable correspondence followed, and on the 16th April, 1885, Mr. Buckley satisfied Messrs. Wallace that this latter mortgage was paid off, and a reconveyance was executed. The form of the debentures was also altered, and the other objections of Messrs. Wallace complied with. The transaction was completed on the 21st July, 1885. Mr. Buckley furnished his bill of costs to Ferguson & Co., on the 27th July, 1885, and he died on the 2nd January, 1886. At the instance of Mr. Ferguson, items 147 and 153 were disallowed by the Taxing Master. No. 147 charged £45 for the mortgage of

£5,000 to the bank, and for preparing the debentures; No. 153 charged £84 2s. 6d. for the lease by the firm to the Company; of this sum £69 2s. 6d. was in respect of the fine of £5,518, £13 in respect of the rent of £41 6s. 6d. thereby reserved, and £2 for registration. It was because of the charge of £69 2s. 6d. that the Taxing Master disallowed this item; his reason being, with regard to both items, that the work prescribed by the General Order under the Solicitors' Remuneration Act, 1881, to entitle the solicitor to the said fees, had not been done, and, more particularly, that no abstract of title had been prepared or searches furnished.

Mr. Robertson, in support of the summons:—

It is conceded that the proper sum was charged, if the schedule applies. As regards the mortgage to the bank, it is true no formal abstract of title was furnished; but the schedule does not require it. The correspondence shows that there was an investigation and deduction of title; there were requisitions by the mortgagee, and these requisitions were complied with. A search was made in the office of the Registrar of Joint Stock Companies, and a certificate of the registration of the Company furnished. As to the lease, the agreement for sale provided that the vendors should deduce and show a good title. True, Mr. Buckley acted for both lessor and lessee; but this agreement threw upon him the responsibility of being satisfied that the Company got a good title, and an action would lie against him if he did not fulfil his duty.

Mr. Bewley, Q.C., contra:—

We admit Mr. Buckley should receive a remuneration for his service, but we contend that the schedule does not apply. It is for “deducing title, furnishing searches, perusing and completing mortgage.” Each and all of these must be done to bring the case within the schedule. There was no deduction of title. If there had been, the Richardson and Board of Works' mortgages would have appeared from the first. What are called the requisitions regarding these mortgages were matters of conveyance, not of title. It is admitted there were no searches in the registry of deeds or of judgments. The English rule corresponds with the

M. R.
1888.
Ante, p. 238.
Ante, p. 433.

Irish, except that it does not require searches: *In re Lacey & Sons* (1); *In re Keeping & Gloag* (2).

Mr. Robertson, in reply:—

Ante, p. 238.

Ante, p. 371.

In *In re Lacey & Sons* (3), the purchaser stated that he would not require an abstract of title: *Ex parte Lord Mayor of London* (4).

THE MASTER OF THE ROLLS:—

I think the Taxing Master was right, though not exactly perhaps for the reasons he has given. There was a step towards a deduction of title, but there was not a deduction of title within the meaning of the schedule rule. It appears that a Limited Company was formed for the purpose of taking over the concern of Messrs. Dickson and Ferguson, Mr. Ferguson being the leading and active member both of the firm and of the Company. The firm being indebted in a large sum to the Northern Bank, it was agreed that the latter should take debentures for £5,000 in the new Company, with a covering mortgage. The property of Dickson and Ferguson was held partly under lease for 999 years, and partly under a fee-farm grant; and a part of each holding was to be transferred to the Company. It was not to get a mere assignment, but a lease for 950 years. Mr. Buckley was employed to carry out the arrangement, acting for both parties.

First, with regard to the preparation of the new lease. It is contended that Mr. Buckley is entitled to charge the sum of £84 2s. 6d. for it, under Rule 5, applicable to Part II. of Schedule I. of the General Orders, under the Solicitors' Remuneration Act, 1881. This Rule provides that where a lease is in consideration partly of a fine and partly of a rent, then, in addition to the remuneration prescribed by Part II., in respect of the rent, the solicitor may charge in respect of the fine, in this case over £5,000, a further sum as if it were a purchase, and the fine were the purchase money. This throws us back to Part I.; and there we find the work for which, on a purchase, the remuneration is to be given detailed. It is for "preparation of contract and conditions of sale,

(1) 25 Ch. Div. 301.

(2) W. N. 1888, p. 49, 2 F. 2.

(3) 25 Ch. Div. 301.

(4) 34 Ch. Div. 452.

deducing title, and furnishing necessary searches, and perusing and completing conveyance." Now, in this case, there was no deduction of title—no ordinary discharge of a solicitor's duty in deducing title. Some services were, no doubt, rendered, which might be considered steps in deducing title, but there was no investigation of it whatever. The crucial test is that there were no searches in the Registry of deeds and of judgments. This is, in Ireland, an essential part of a solicitor's duty when employed to deduce or investigate title. No purchaser, even from the direct grantee under a Landed Estates' Court conveyance, would accept a title without searches. In this case the parties were agreed. The title of Dickson, Ferguson, and Co. was accepted without investigation, and Mr. Buckley discharged the merely ministerial duty of seeing it properly transferred to the Company. He, therefore, is not entitled under the schedule, and his remuneration must be under the system in force before the passing of this Act.

The question is rather more difficult as regards the mortgage to the bank. The bank, being already a mortgagee by deposit of the lease of portion of the premises to be conveyed, was to take debenture shares for its debt, and a collateral mortgage both of the leasehold and freehold premises. A doubt existed in my mind whether there was not a deducing of title starting from the admitted position of the Company. The bank had to be satisfied of the power of the Company to mortgage at all. The certificate of the registration of the Company was furnished, and various requisitions of the bank were made and satisfied. I do not think the inquiries as to the Richardson and Board of Works' mortgages were merely matters touching the form of the conveyance; they were matters both of conveyance and of title. But they are not enough to bring the case within the schedule. It enumerates four necessary duties, and one of these is furnishing searches. The fact that this is not in the corresponding English Rule shows that it is not a mere matter of form. Bearing in mind the difference between English and Irish law on this branch of conveyancing, it shows that if a solicitor is really deducing title he must, in Ireland, furnish searches, and that the framers of the order so thought. In *In re Mayor of London* (1), the Judge decided that merely *Ante*, p. 371.

M. R.
1888.

Ante, p. 238.

reading an Act of Parliament constituted in that case an investigation of title. If that case were exactly like this I should be prepared to follow it; but the case before me is much more like *In re Lacey & Sons* (1), where the Judges of the Court of Appeal went out of their way to deliver their opinions expressly for the guidance of the profession on a point not actually necessary for their decision; and they were unanimous in stating that the schedule applied only where substantially the whole of the work for which the percentage is chargeable, as particularised in the schedule, had been done. Here, though something was done in the way of deducing title, there was no full deduction of title, and there were no searches. I think the Taxing Master was right, and I must refuse the motion, with costs.

Solicitors for executors of Mr. Buckley: *Messrs. Buckley and Murray.*

Solicitors for Ferguson & Co.: *Messrs. L'Estrange & Brett.*

THOMPSON BROS. v. BOLTON.

Nov. 6.

(By permission, from 21 I. L. T. R. 96.)

Costs—Three counsel—Consultation between two junior counsel—Difference between English and Irish Practice.

The Court will not interfere with the discretion of the Taxing Officer unless a question of principle is involved or in an extreme case.

Circumstances under which fees for consultation between two junior counsel were allowed; while the Court differed as to whether the case warranted the employment of three counsel.

MOTION on summons (adjourned into Court) on behalf of the defendant that the Taxing Officer's decision allowing certain items in the plaintiff's bill of costs should be reversed. The items were of three kinds—first, being a fee to a third counsel; second, a fee for consultation between two junior counsel before the senior counsel had been brought in; third, a fee to counsel on direction of proofs. The objection to the third item was abandoned. The

action was brought to recover £32 6s. 10d. as balance due for goods sold and delivered. A notice in lieu of statement of claim was served, and the defence set out that the £32 was part of a larger sum, which included £57 for miscellaneous goods and £140 the price of a second-hand steam-engine. The defence alleged that the goods for which £57 had been charged were only value for £36, and that no fixed price had been agreed on. The defendant brought the £11 6s., which he admitted to be due, into Court, and further pleaded that a warranty had been given with the engine, alleged a breach, and claimed £20 damages, and counter-claimed for breach of warranty and fraudulent misrepresentation, and claimed £30 damages.

When the case appeared in the list for trial, the plaintiff had only two counsel, both juniors, and the case was made a remnant for want of time to hear it. Before the next sittings, plaintiff called in a Q.C. At the trial there were six witnesses examined for the plaintiff, and several for the defendant, and a long correspondence was put in evidence. There was a verdict for the plaintiff for £10 over the amount lodged in Court, and also findings on the counterclaim for the plaintiff. Plaintiff's solicitor did not personally attend on the taxation of costs, and the Taxing Officer disallowed one guinea of three on the case for proofs to senior and junior counsel, and also disallowed the fee for consultation between the two junior counsel, and disallowed the brief and fee for the third counsel.

The plaintiff objected to the disallowance, and the Taxing Officer reviewed his taxation, and allowed these items upon plaintiff's solicitor attending and giving an explanation of the special circumstances which had arisen in the case, and producing counsel's certificate for consultation. From the decision of the Taxing Officer, allowing these items, the defendant now appealed.

Meredith, for the defendant, referred to schedule 3 of the C. L. P. Act, 1853; *Galway Election Petition* (1), *Robb v. Atne*, p. 108. *Connor* (2), *Smith v. Barry* (3); *Morgan and Davey's Chancery Ante*, p. 135. *Costs*, 2nd ed., 489.

(1) 7 Ir. L. T. Rep. 189, Ir. R. 7 C. L. 445.

(2) 9 Ir. L. T. Rep. 115, Ir. R. 9 Eq. 373.

(3) L. R. 19 Eq. 473.

Exch. Div.
1888.

Rynd, for the plaintiff, argued that there was nothing to prevent a consultation between two junior counsel, and also that the case was one which the Taxing Officer in his discretion might hold to be fit for three counsel. The trade character of the plaintiff was involved, as the engine had been used by him for years before he sold it, and therefore any misrepresentation concerning it must have been deliberate. The proof of value of the goods taken by the defendant was both difficult and complicated.

DOWSE, B., held that the Taxing Officer had properly exercised his discretion. The Court would not, as a rule, interfere unless a question of principle was involved, the exception being extreme cases, and in these latter if the discretion had been plainly wrongly exercised, as, for example, by allowing fees for a number of counsel, the Court would interfere. The nature of the action, though at first sight simple, appeared to him to be of sufficient importance to justify the employment of three counsel. The Irish Practice differs from the English. In the English Courts the leader opens the case, examines witnesses, cross examines, and closes; in Ireland the work is shared.

ANDREWS, J., concurred, except as to allowing three counsel. His Lordship could not see anything in the circumstances of the case rendering three counsel necessary.

The Court made no rule on the motion, and as the plaintiff had succeeded on two items, and the Court is divided on the question of allowing third counsel, the defendant should pay the costs of the motion.

Order accordingly.

Plaintiff's solicitor : *S. C. McCormick.*

Defendant's solicitor : *Wm. Sterne.*

In re GREVILLE'S SETTLEMENT.

Kay, J.
1888.

(By permission, from 40 Ch. D. 441; s. c. 37 W. R. 150, 58 L. J. Ch. 256, 60 L. T. 43.)

Nov. 14.
Dec. 11.

Solicitor and Client—Remuneration—Scale-charge—Sale—Land out of Jurisdiction—Irish Land—Lord Ashbourne's Act, Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict., c. 73)—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), General Order under Rule 2 (a), Schedule I., Part I.

The General Order under the Solicitors' Remuneration Act, 1881, fixing a scale charge does not apply to a sale of land not situated in England.

Thus, where an English solicitor carried out a sale under Lord Ashbourne's Act, the Purchase of Land (Ireland) Act, 1885, of land in Ireland belonging to a client, and employed an Irish solicitor to do so much of the work as had necessarily to be done in Ireland:

Held, that the English solicitor's remuneration was not regulated by Schedule I., Part I. to the General Order under the Solicitors' Remuneration Act, 1881.

SUMMONS TO REVIEW TAXATION.—In February, 1886, Mr. Greville, who was, under his marriage settlement, dated in 1870, the tenant for life of certain estates in the County of Roscommon in Ireland, consulted an English firm of solicitors in London with reference to a proposed sale of portions of the estates to the tenants under the provisions of Lord Ashbourne's Act, "The Purchase of Land (Ireland) Act, 1885." Preliminary negotiations with the tenants were then made by an Irish land agent on Mr. Greville's behalf, and the sales were eventually carried out and completed under the powers of that Act through the English firm, who prepared the abstracts of title, and did all the work which could be done in England; but, in order to complete the sales and to carry out the legal work which, under the rules of the Irish Land Commission, had necessarily to be done in Dublin, they employed a firm of solicitors in Dublin.

In May, 1888, the English firm delivered to Mr. Greville a detailed bill of costs in relation to the sales in accordance with Schedule II. to the General Order under the Solicitors' Remuneration Act, 1881. They also delivered a cash account, including the charges of the Dublin firm, of which the English firm had themselves already paid part and subsequently paid the remainder.

No election had been made by the English firm under Rule 6 of

Kay, J.
1888.

the General Order under the Solicitors' Remuneration Act, 1881, to accept their remuneration according to the old practice as altered by Schedule II. to the General Order.

On the 10th of July, 1888, Mr. Greville and the trustees of his settlement applied for and obtained the usual order for taxation of the bill, and the bill was duly taxed thereunder. Subsequently the applicants carried in objections to the Taxing Master's certificate on the ground that the bill, so far as it related to completed sales, should have been made out according to the scale in Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, and that the scale-charge only should be allowed in respect of such sales, together with the other allowances under paragraph 4 of such General Order. The Taxing Master overruled these objections, stating in his answers to them that all the sales which were completed were carried out under Lord Ashbourne's Act through the Land Commission in Dublin; that the Dublin firm transacted that part of the business which could not have been transacted in England; that Schedule I. of the General Order under the Solicitors' Remuneration Act did not apply to property out of the jurisdiction of the Supreme Court; that Lord Ashbourne's Act provided that the Irish Lord Chancellor should make a General Order with respect to the remuneration of solicitors in Ireland; and that the Order which was in fact so made regulated the charges of the Dublin firm, but that the charges of the English firm were governed by Schedule II. of the General Order under the Solicitors' Remuneration Act.

Mr. Greville and his trustees then took out this summons to have the objections to the taxation allowed, and the Taxing Master's certificate referred back to him to be varied accordingly.

Section 21 of Lord Ashbourne's Act, Purchase of Land (Ireland) Act, 1885, is as follows:—"Rules for carrying this Act into effect shall be deemed to be rules under the Land Law (Ireland) Act, 1881, and shall be made by the Land Commission accordingly, and forms and tables shall be settled or adapted by the Land Commission for the purposes of this Act."

On the 5th of December, 1887, rules were issued by the Irish Land Commission under the Irish Land Acts, including Lord Ashbourne's Act, in relation to the acquisition of land by tenants,

it being provided by Rule 107 that, in the absence of any special agreement between a solicitor and his client, the costs of sales and proceedings under the Act should be regulated partly by the schedule of fees in the appendix to the rules, partly by the schedule of fees then in force in relation to proceedings before the Land Judges, and partly by the schedule of fees in force before the General Order in Ireland under the Solicitors' Remuneration Act, 1881, as amended by Schedule II. to such General Order.

Millar, Q.C., and R. F. Norton, for the clients:—

We submit that the solicitors are only entitled to the scale-charge allowed by Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881. That Act applies to Ireland, and is, in fact, independent of locality. Rule 2 (a) of the General Order, in requiring that sales and purchases shall be regulated by Part I. of Schedule I., contains no limit as to place. Any payments made by the English firm to the Dublin firm should, we admit, properly be allowed to them under Rule 4, as disbursements, in addition to the remuneration prescribed by Schedule I.

The principles of remuneration laid down by Section 4 of the Act apply equally to Ireland as to England.

Marten, Q.C., and Warrington, for the English solicitors:—

We submit that the scale-charge does not apply to purchases and sales of land in Ireland, being applicable only to the sale of land in England. Here the sales were made under Lord Ashbourne's Act, and under that Act rules have been issued for the remuneration of solicitors in Ireland in the case of any such sale. So that these rules exclude the operation of any others in cases of sales under that Act. In fact, the scale-charge provided by the General Order under the Solicitors' Remuneration Act, 1881, can only apply, and is intended only to apply, to the ordinary case of a sale in England: it is inapplicable to the peculiar modes of sale under Lord Ashbourne's Act, or any other of the Irish Land Acts; it is not adapted to any sale of property out of the jurisdiction. The Solicitors' Remuneration Act really contemplates rules being made by two independent authorities in England and Ireland; and, in point of fact, there is a General Order in force under the Act for

Kay, J.
1888.

Ireland as distinct from England. The English Order has no application to Irish property at all. Even assuming the General Order does apply to a sale of property out of the jurisdiction, Rule 2 (a) directs that the scale-charge is to apply where the solicitor has "the conduct of the business." Here the English solicitors did not have the conduct of the business in Ireland relating to the sale. Again, the scale-charge only applies to business, the whole of which is done by the solicitor: *In re Lacey and Son* (1). Here the whole of the work relating to the sale was not, and could not have been, done by the English firm.

Ante, p. 238.

Norton, in reply:—

The English firm had "the conduct of the business" within Rule 2 (a). They did the bulk of the work, employing an agent to do what they could not actually do themselves.

KAY, J.:—

Ante, p. 247.

A vendor of land in Ireland, which was recently sold under Lord Ashbourne's Act, complains of the mode of taxation of his solicitors' bill of costs in England, on the ground that the Taxing Master has not allowed the scale-fee. He says the Taxing Master ought to have allowed the scale-fee, although the land is in Ireland; and he says so because, to use the language of Lord Justice Lindley in *In re Lacey & Son* (1), "substantially the whole of the work mentioned" (in Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act of 1881)—"*i.e.*, deducing the title and perusing and completing the conveyance," has been done by the London solicitors. Now, Schedule I., Part I., gives a scale fee to the vendor's solicitor of so much "for negotiating a sale of property by private contract," so much "for conducting a sale of property by public auction," and so much "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract, or conditions of sale, if any)." The argument is that, the work having been done by the English solicitor, he was bound to charge only the scale-fee. If he wanted to protect himself he might, before undertaking the work, have said: "I will not do this work for the

scale-fee." Of course the client might have said to the solicitor, "Now mind, before I put the work into your hands you are not to charge the scale-fee." Nothing of that kind was done by either of them. I am now asked to say that the scale-fee applies.

The argument is this: this land is in Ireland, but it does not matter where the land is—it may be in any part of the world—and if the English solicitor deduces the title, peruses the conveyance, and completes it by obtaining the vendor's signature or execution, then he is entitled to the scale-fee, and he is bound to charge the scale-fee unless there is a different contract. The question is, what does the Solicitors' Remuneration Act, 1881, mean? I look at the Act, and I find this. The 2nd section provides that General Orders may be made "for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court," and so on. Sect. 4 is this: "Any General Order under this Act may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another or others, and may, as regards the amount of remuneration, regulate the same with reference to all or any of the following, among other, considerations—namely, the position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like; the place, district, and circumstances at or in which the business or part thereof is transacted; the amount of the capital money or of the rent to which the business relates; the skill, labour, and responsibility," and so on.

Now, it was under and with reference to that Act that the present General Order was made; and, in the first place, I observe that there is not a word in the General Order about the place or district in which the business is transacted. The first rule of the Order is as follows: "This Order is to take effect from and after the 31st day of December, 1882, except that Schedule I.

Kay, J.
1888.

Kay, J.
1888.

hereto shall not apply to transactions respecting real property, the title to which has been registered under the Acts," mentioning certain English Acts. The second rule is this: "Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master, is to be regulated as follows." That follows exactly the words of sect. 2 of the Act of Parliament. Then the rule gives the different classes of business. Sub-rule (a) is: "In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained."

Now, I turn at once to the schedule. It deals separately with sales, purchases, and mortgages; and it provides for the remuneration, not only of the vendor's solicitor, but also of the purchaser's solicitor. The argument is that, no matter in what part of the world the sale may be, these rules apply. Take, for example, a remote part of Russia; suppose the purchaser to be a Russian subject out there, do the rules apply to him? Most clearly they do not, unless he employs a solicitor in England. The real question is, What does the Order mean? The schedule says, with respect to the vendor's solicitor, "for deducing title to freehold, copyhold, or leasehold property," and I have read from the first rule of the Order an exception as to real property, the title of which is registered in England. Now, "real property" has no meaning with respect to many foreign countries—there is no such thing in our sense; and in this schedule I find this: "Vendor's solicitor for deducing title to freehold, copyhold, or leasehold property." In many countries of the world such a thing as copyhold property was never heard of. Am I to read this Act as applying to "freehold, copyhold, or leasehold property" in any part of the world, whereas in many parts of the world not one of those three words would have any meaning at all? For instance, I am not sure that "copyhold" has any meaning at all except in

England. In my opinion that was not the intention of the Act. There are very many reasons, indeed, why one should not construe the Act as including the sale of property in foreign countries unless one is obliged, and those reasons seem to me to be more in favour of the client than of the solicitor; but, apart from any such considerations, I cannot find in the Act, or in the General Order under it, any intimation that the Order is to apply to property which is not in this country, or which, according to the argument, is in any part of the world. It is said that there is no harm in putting that interpretation upon the Act and Order, because in any such case the solicitor can only charge—according to the decision in *In re Lacey & Son* (1)—in case he does all the work, that is, deduces the title, prepares the conveyance, and completes it. Even in the case of property in England, he is not entitled to the scale-fee unless he does all that; and of course he would not be entitled to the scale-fee in respect of property abroad unless he does all that. It would be obvious and apparent to everyone that, if the sale is of property abroad, although in some sense he would do the work, a great part of the work must of necessity be done over again by some agent employed in the place abroad; and although he might make out an abstract of his own, and peruse the conveyance that is sent over and get his client to execute it, in my opinion he would not bring himself within the General Order.

Kay, J.
1888.

Ante, p. 238.

Take, for example, the case of a sale of land in New Zealand. The sale—or, at any rate, the conveyance—of land in New Zealand is carried out in a manner entirely different from that in England. There is a registration of the assurance, which is not complete and perfect until it is registered. The business is such that an English solicitor, although he might possibly obtain the execution of the instrument of assurance itself, could never be able to carry out without employing a colonial solicitor; and in the case of land in any other foreign country, although the solicitor in this country might bring himself within the letter of this General Order by deducing the title, by perusing the assurance, and by completing it by obtaining the signature of his client, yet by reason of the usage, and in most cases the law, of the foreign

(1) 25 Ch. D. 301.

Kay, J.
1888.

country being different to the usage and law of this country, he must of necessity employ, to do all the essential part of the work, some skilled person in the foreign country. It is said, "That is right; so he should; and he would be allowed all proper charges for that." But the case now before me is a perfect illustration of the difficulty that would arise from putting that construction on the General Order. Here the sale has taken place under Lord Ashbourne's Act. The Solicitors' Remuneration Act applies to Ireland, and rules are to be made in Ireland to carry it out. But in Ireland in certain cases Lord Ashbourne's Act excludes the application of this Act, and provides for a peculiar mode of carrying out the sale by application to the Land Commissioners' Court, or some Court constituted in Ireland which has to watch the proceedings, and especially to secure the money which is charged upon the land and not actually paid over. All that has to be done, and in this case has been done, by solicitors in Ireland; and I have a very strong belief that, if the scale-fees were actually charged and there were allowed, besides, such disbursements as were fair and reasonable to the Irish solicitors, the vendor would find it to his disadvantage, for he would have to pay a great deal more than he has to pay under the present taxation. However, I do not find in this Act of Parliament, or in the General Order under it, any indication that the scale-charge is to apply in case of a sale of property out of the jurisdiction of the English Courts; and if that had been the intention, I should have expected very much more distinct words to show it, specially when I find that the Act of Parliament does say that any General Order under it may regulate the charge with respect to the "place, district, and circumstances at or in which the business or part thereof is transacted." I find nothing in this Order to contemplate the transaction of the business of a sale and conveyance of land which is out of the jurisdiction of the Courts of England. I wish to put my judgment on the broadest ground possible, because the point is a very important one, and it may be necessary to carry it further now or at some other time; and I hold that the Order under this Act does not apply, and was not intended to apply, to the sale of land which is not in England.

I dismiss the summons with costs, including the costs of the reference back to the Taxing Master.

Kay, J.
1888.

Solicitors: *Bloxam, Ellison, & Co.; Collyer-Bristow, Withers, Russell & Hill.*

PARKER AND OTHERS, *Appellants*; AND CATHERINE
BLENKHORN, *Respondent*.

H. L. (E.)
1888.

WILLIAMSON NEWBOULD, *Appellant*; AND BAILWARD
AND OTHERS, *Respondents*.

Nov. 29.

(By permission, from 14 App. Cas. 1; s. c. 37 W. R. 401, 59 L. T. 906.)

(House of Lords.)

Solicitor and Client—Costs—Taxation—Remuneration for conducting sale by auction when Auctioneer paid by Client—Scale fees—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44)—Gen. Ord., 1882, ss. 2, 4, 6, Sched. I., Part I., r. 11.

Part I. of Sched. I. to the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44) prescribes an *ad valorem* scale-fee for conducting the sale of property by public auction, and rule 11 provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer."

Where the auctioneer's commission is paid by the client :—

Held, reversing the decision of the Court of Appeal, that rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the General Order, sect. 2, sub-sect. (c.), he is entitled to a *quantum meruit* for such work, the remuneration to be regulated according to the old system as altered by Sched. II.

In re Newbould (20 Q. B. D. 204) reversed. *In re Faulkner* (36 Ch. D. 566) approved.

THESE two appeals were heard together, both raising the same question under the General Order of 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44). The following extracts from that General Order, and the schedules and rules bear upon the point in question :—

"2. Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases,

H. L.
1888.

leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action or transacted in any Court, or in the chambers of any judge or master, is to be regulated as follows, namely:—

“(a.) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained.

“(b.) In respect of leases, and agreements of leases, of the kinds mentioned in Part II. of Schedule I. to this Order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I.

“(c.) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto.

“4. The remuneration prescribed by Schedule I. to this Order is not to include stamps, counsel's fees, auctioneer's or valuer's charges . . .

“6. In all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order.”

Schedule I., Part I., prescribes a scale of charges to be made

by the vendor's solicitor "for conducting a sale of property by public auction, including the conditions of sale," and a further scale "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract, or conditions of sale, if any)."

The material part of Rule 11 of Schedule I., Part I., is as follows:—

"11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer . . . In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply."

In *Parker v. Blenkhorn* the facts were as follows:—A firm of solicitors, Parker, Garrett & Parker, were employed by the first mortgagee of freehold property in respect of a sale of the property by public auction. The solicitors instructed auctioneers to sell, and themselves attended the sale and did other work in respect of the conduct of the sale. The solicitors paid the auctioneers' charges, which included a lump sum in lieu of a percentage, and included these charges in their bill of costs. The solicitors did not charge under Schedule I., Part I., the *ad valorem* scale-fee for conducting a sale by public auction, but they charged various items for the attendance at the sale and other work done in respect of the conduct of the sale. They also charged the scale-fee "for deducing title," &c. There being a small surplus after paying off the first mortgagee, the question of the solicitors' charges arose between them and the second mortgagee, the present respondent, who took out a summons for taxation.

The Taxing Master disallowed the items charged in respect of the conduct of the sale upon the authority of *In re Newbould* (1). This decision was affirmed by Chitty, J., and the learned judge's decision was affirmed by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) upon the same ground.

Against this decision the solicitors and the first mortgagee appealed.

(1) 20 Q. B. D. 201.

H. L.
1888.

Nov. 27, 29.

Sir Horace Davey, Q.C. (R. S. Wright with him) :—

The case falls within Rule 11, a lump sum in lieu of a percentage being no doubt “commission” within the meaning of that rule. The items are not in dispute, and the only question is whether *In re Newbould* (1) was rightly decided. There it was held that in a case like the present where by Rule 11 of Schedule I., Part I., the solicitor cannot charge the scale-fee, because the auctioneer’s commission is paid by the client, the solicitor is entitled to no remuneration for all the work he does in respect of the conduct of the sale. If this be the true construction of the General Order and Schedules, the result is strange; the solicitor receives nothing for some of the most important work he has to do—*e.g.*, advising the client as to the reserve price, seeing that the particulars are accurate, attending the sale to receive the purchase-money and answer questions about title, &c. The Court of Appeal in *In re Newbould* (2) read Rule 11 of Schedule I., Part I., as if it said that where the scale does not apply the solicitor shall receive no remuneration. But the words in the beginning of Rule 11 “shall apply only” are the same as at the end where it is provided that “in case of sales under the Lands Clauses Consolidation Act the scale shall not apply.” No one would contend that the solicitor is not to be remunerated in sales under the Lands Clauses Consolidation Act: then why is he not in sales by public auction? The matter is dealt with by General Order, sect. 2, sub-sect. (c.), which says that in respect of all other business not thereinbefore provided for the remuneration is to be regulated according to the former system as altered by Schedule II. thereto, in other words, upon a *quantum meruit*. The appellant’s contention is clearly put by North J., in *In re Faulkner* (3), where the point now in question was rightly decided. The principle of remuneration on a *quantum meruit* under the old system was recognised by the Court of Appeal in *In re Lacey & Son* (4) in a question under the head of deducing title. The cases of *In re Field* (5) and *In re Emanuel & Simmonds* (6), relied on by the Court of Appeal in *In re Newbould* (7), were cases of leases, and have no application to sales.

(1) 20 Q. B. D. 204.

(2) 20 Q. B. D. 204.

(3) 36 Ch. D. 566.

(4) 25 Ch. D. 301.

(5) 29 Ch. D. 608.

(6) 33 Ch. D. 40.

(7) 20 Q. B. D. 204.

Ante, p. 238.

Ante, p. 278.

Ante, p. 332.

Cozens-Hardy QC., and *Oswald*, for the respondent :—

H. L.
1888.

The object of the Solicitors' Remuneration Act, 1881, was to exempt clients from the long-detailed bills of costs and charges, the amount of which they could not ascertain beforehand, and to make them liable to pay only according to a scale which they could calculate. If a solicitor does not wish to be remunerated according to the scale, he has his election; he may under General Order, sect. 6, by agreement with the client, elect that his remuneration shall be under the old system as altered by Schedule II. Again, if he thinks it worth his while he may in the case of a sale by public auction pay the auctioneer's commission himself, and charge the client with the *ad valorem* scale-fee for conducting the sale, and this course he will take if the commission is small and the scale-fee large. If, on the other hand, the auctioneer's commission is large and the scale-fee is small, he can make the client pay the auctioneer's commission, but in that case he can make no charge at all in respect of the conduct of the sale. The object of the order and the rules was to have only one and not two conductors of the sale. If the solicitor comes under the scale at all he must remain under it; he must take the rough with the smooth, and cannot take advantage of it in part and escape from it where it is disadvantageous. He must elect before he begins the work, or not at all: *In re Allen* (1); *Hester v. Hester* (2). According to the appellants' contention the solicitor can wait till the last moment when he delivers his bill before deciding whether to take the scale-fee and pay the auctioneer's commission himself, or to make the client pay the latter and be remunerated himself under the old system. If Rule 11 had intended that consequence, words would have been inserted similar to those in Rule 10 about mortgages: "As to such transfers and further charges, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." The interpretation put by the appellant on General Order, sect. 2, sub-sect. (c.) will not hold, because the business "thereinbefore provided for," viz, by sub-sect. (a.) Rule 11 controls General Order, sect. 4, which, but for Rule 11 would enable the solicitors to charge the *ad valorem* scale-fee and make the client pay the auctioneer's commission:

Ante, p. 349.
Ante, p. 360.

(1) 34 Ch. D. 433.

(2) 34 Ch. D. 607.

H. L.
1888.

In re Wilson (1). The decisions as to leases are strictly applicable to cases of sale, there being no difference in principle.

Sir Henry Davey, Q.C., in reply :—

In re Wilson (2) is in the appellants' favour, for there, though the point is not argued, the Court of Appeal allowed a *quantum meruit* remuneration.

The appeal in *Newbould v. Bailward* was then heard. There a similar question arose between the vendor, Bailward, and his solicitor, Newbould, under the circumstances set forth in the report of the decision of the Court of Appeal (3).

Bowen Rowlands, Q.C. (*Arthur Yates & F. C. Philips* with him), for the appellant.

Lumley Smith, Q.C., & *G. E. S. Fryer*, for the respondents.

The arguments were the same as in *Parker v. Blenkhorn*.

LORD HALSBURY, L.C. :—

My Lords, in the case of *Parker v. Blenkhorn* as in that which follows, it appears to me the question lies within a very narrow compass. I absolutely decline from myself to inquire into the merits of the original taxation, as to whether there was a meritorious claim by the solicitor or the reverse.

The sole question which I believe is before your Lordships now is the true construction of the Act of Parliament and the rules made thereunder, and that question appears to be reduced to this, whether the language of the General Order, Section 2, and the sections and rules which follow it are to receive this application: that wherever the business done by a solicitor for a client is the subject of taxation, and it can be affirmed that the particular scale does not apply, your Lordships are by construction to add that if the scale does not apply no other remuneration shall be recoverable.

My Lords, I can find nothing justifying such interpretation in either the Statute or the General Order made thereunder, or the rules made under the General Order. The scheme of the Statute

of the General Order appears to me to be intelligible enough, that in respect of certain specific business which may or may not vary in the amount and degree of care and experience requiring the performance of it, but as to which it is possible for the Court beforehand to prescribe what shall be a reasonable amount for such business so done; that in respect of all such business coming within the scale which is by the Statute and by the General Order applied to such business, that shall be the amount of remuneration which shall be recoverable. The Statute did not mean and the General Order did not purport to enact that those scales shall be exhaustive; on the contrary, in sub-section (c) of Section 2 there is the express exception of "business not hereinbefore provided for," which in substance enacts that that business shall be charged for as heretofore. I say "as heretofore," because although that is qualified by the expression "as altered by Schedule II.," Schedule II. provides not exhaustively at all, but only in respect of certain matters, a change in the actual amount of the charges to be made therein prescribed, and it leaves untouched a very large class of business which is to be paid for according to the existing system.

The problem which your Lordships are called upon to solve is whether in the word "regulated" in Section 2, and the words "subject to the regulations therein contained," that is, contained in Part I. of Schedule I. to this Order, or in the language of Rule 11, there is or is not comprehended the implied—certainly not expressed—enactment that no other charges shall be recoverable.

By the consent of all the learned persons who have been engaged in the controversy on this subject, this is a case which comes within the first three lines of Rule 11. Those words are "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." It is agreed by all that this is not a case to which within that language the scale applies. As I pointed out in the course of the argument, the latter part of the very same rule provides that in cases of sales under the Lands Clauses Consolidation Act, and so forth, the scale shall not apply. If the same construction is to be given to the last part of Rule 11, which it is contended is to be given to the very same words in the earlier part of the clause—namely, the words

H. L.
1888.

"shall not apply," it reduces the construction of that rule to an absurdity. The learned counsel for the respondents themselves are compelled to admit that with reference to the latter part of the rule you must apply the construction which they repudiate as being applicable to the first part of the rule, and for the very obvious reason that if in the latter part of the rule you are to add the words that no remuneration whatever shall be recoverable (which are the words they seek to introduce by construction into the earlier part of the rule), for some reason or other which no one has been able to assign, the Legislature has taken away from professional men engaged in such transactions all remuneration whatever for conducting sales under the Lands Clauses Act. My Lords, that is too absurd a construction to be insisted upon. But if that is too absurd, how comes it that in the very same rule as applicable to the very same subject-matter we are to understand the words "shall not apply" in one sense in the one case and give a totally different construction to the same words in the other?

My Lords, it seems to me there is no foundation whatever for saying that this case is in any way governed by the authorities on leases which have been referred to. The Court may or may not have been right when they held that the business for which remuneration was sought was included in the scale as applicable to leases. That decision may have been right or wrong, but what relevancy has it to this case? If the business was included in the scale applicable to leases, then the scale would apply and no question would arise. If the scale applied, the solicitor seeking to recover was bound by the scale. The simple proposition appears to me to be, that wherever you have established a scale-work you must recover and can only recover scale-charges. With that exposition of the Statute, it seems to me that it is simple enough in its enactments, leaving uncovered anything except that to which by the Statute and by the General Order and Rules made thereunder the scale applies.

My Lords, that is simply the whole proposition, and if I were able to follow the premise of the Master of the Rolls in the judgment he has delivered in the case of *In re Newbould* (1), I should be obliged to follow him in his conclusion, but I differ from him

(1) 20 Q. B. D. 204.

because I am wholly unable to adopt his language when he says :
“ If he can bring himself within any part of that scale, he is entitled to fees according to that scale. If he cannot, he is not entitled to be paid anything.”

H. L.
1888.

My Lords, I am wholly unable to find any trace of such a meaning in the Statute or in the General Order and Rules ; and therefore, as regards the first case under appeal before your Lordships, I move that the appeal be allowed, but without costs, as arranged between the parties.

As regards the appeal in *Newbould v. Bailward* the same observations apply, and I move your Lordships that the appeal be allowed with costs.

LORD WATSON :—

My Lords, upon the main question which has been raised and argued before your Lordships in these two appeals, I am of opinion with the Lord Chancellor that the judgment of the Court of Appeal must be reversed.

I agree with all the observations which have been made by the noble and learned Lord ; and for myself I only desire to add that the effect of the General Order when read, together with its Schedules and with the Rules, appears to me to be simply this, that solicitors employed to sell property who do not avail themselves of the provisions of Article 6 of the Order become entitled to remuneration according to the existing system as altered by Schedule II., except in the case of professional work to which Schedule I. applies, and for which a scale fee is payable in terms of that Schedule. The constantly recurring expression that the scale “ shall not apply ” cannot, in my opinion, be reasonably interpreted as signifying that in cases where it is inapplicable the solicitor is to be deprived of all remuneration for his work.

LORD MACNAGHTEN :—

My Lords, I quite concur. I cannot agree with the Court of Appeal that there is no distinction to be found in the remuneration order between the treatment of business connected with sales and the treatment of business connected with leases. It appears to me that there is a very marked and a very important distinction. All

H. L.
1888.

the business connected with a lease from the commencement of the transaction down to its completion is treated as one single operation to be remunerated by one charge. The business connected with the sale (whether the sale be by private contract or by auction) is divided into two parts or stages. There is the preliminary stage before the relation of vendor and purchaser is established. There is the final stage, which covers the deduction of title and the perusal and completion of the conveyance, and includes (as more akin to the business belonging to that stage of the transaction) the preparation of the contract or conditions of sale, if any. For each of these two parts a separate charge is prescribed in the scale schedule. If a solicitor is within the scale as regards one of these parts, is he not to be remunerated for his services in regard to the other part of the transaction, unless he can bring himself within the scale as regards that part also? That is the whole question.

There is some obscurity in the language of the Order. No doubt it would have been clearer if in the scale schedule a note had been appended in the first column to the effect that when the scale did not apply, the solicitor's remuneration in respect of business which would be covered by the scale fee, if the scale applied, was to be regulated according to the old system as altered by Schedule II. But this is, I think, the true effect of the Order when the scale schedule is read in connection with Clause 2 of the Order and its sub-sections and with Rule 11.

I am therefore of opinion that Mr. Justice North was right, and that these appeals ought to be allowed.

Parker and Others v. Blenkhorn :

Order appealed from and order of the Chancery Division thereby affirmed reversed, with a direction that the bills of costs in the pleadings mentioned be referred back to the Taxing Master for further taxation. Cause remitted to the Chancery Division.

Newbould v. Bailward :

Order appealed from and Order of the Queen's Bench Division thereby affirmed reversed with costs here and below the repayment of costs already paid, with a direction that the bill of costs in the pleadings mentioned be referred back to the Taxing Master

for further taxation. Cause remitted to the Queen's Bench Division.

H. L.
1888.

Lord's Journals, 29th November, 1888.

In *Parker v. Blenkhorn* :

Solicitors for appellants: *Parker, Garrett & Parker.*

Solicitors for respondent: *A. M. Bradley, for Berry & Berry,*
Huddersfield.

In *Newbould v. Bailward* :

Solicitor for appellant: *W. Newbould.*

Solicitors for respondents: *W. & F. Flower & Nussey.*

In the Matter of THE SOLICITORS' REMUNERATION
ACT, 1881; *Ex parte* STRANGE.

V. C.
1888.

Dec. 12, 18.

(*By permission, from 21 L. R. Ir. 529.*)

Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—
General Order, 1884, Schedule II.—Journeys and attendances not connected with conveyancing.

A solicitor, who was employed by a Board of Guardians to prepare a scheme for the erection of cottages under the Labourers (Ireland) Act 1883, furnished his bill of costs, in which he charged fees of five guineas each for attendances and journeys in connection with the business. The Taxing Officer having reduced these charges to the amount that would have been allowed prior to the passing of the Solicitors' Remuneration Act, 1881.

Held, affirming the decision of the Taxing Officer, that, even assuming such business to come within the Act (which *seem* it does not), the scale of taxation applicable was that which existed at the time of the passing of the Act, and not any higher one prescribed by the General Order of 1884.

SUMMONS to review the Taxing Officer's certificate.

Mr. L. C. Strange was solicitor for the Guardians of the Poor Law Union of Kilmacthomas, in the County of Waterford, in connection with the carrying out of a scheme under the Labourers (Ireland) Act, 1883 (46 & 47 Vict., c. 60), for the purpose of

V. C.
1888.

erecting labourers' cottages. The scheme, which was adopted by the Guardians, was sanctioned by the Privy Council, on the 5th April, 1887, and had been successfully carried through.

Mr. Strange furnished the Guardians with his bill of costs, in respect of the said scheme and the proceedings thereunder, on the 1st July, 1887, and was served by them subsequently with a requisition for taxation. The taxation took place before Mr. Davis, Taxing Officer, when Mr. Strange contended that he was entitled to charge, under the Solicitors' Remuneration Act, for the work done and charged for. There were no items of conveyancing costs included in the bill, and the Taxing Officer decided that the costs were not chargeable under the scale of fees allowed by the Solicitors' Remuneration Act. In consequence of that ruling, two sets of items in the bill of costs were reduced. The first set of items consisted of charges of £5 5s. each for attendances before the Board of Guardians, and the second set consisted of charges of £5 5s. each for attendances before the Privy Council on the hearing of the case there. The Taxing Officer reduced both sets of items from five guineas to three, the latter being, in his opinion, the maximum rate of remuneration chargeable under the ordinary scale of fees.

Mr. Strange then issued a summons to refer back the costs to the Taxing Officer to re-tax, with directions to allow the various sums disallowed by him, according to the scale set out in the schedule to the Solicitors' Remuneration Act, 1881.

Mr. Cherry, in support of the application :—

The meaning of Schedule II. is to regulate all kinds of business, not merely conveyancing. The headings to the different classes of work show this. There is one heading in capital letters for "INSTRUCTIONS FOR DRAWING AND PERUSING DEEDS, WILLS, AND OTHER DOCUMENTS," another for "ATTENDANCES," another for "ABSTRACTS OF TITLE," and another for "JOURNEYS FROM HOME." The break is complete, and shows the journeys from home may be applied to business other than conveyancing. It appears clearly from the copy of the schedules and rules issued by the Queen's printer.

Mr. C. L. Matheson, for the Guardians:—

V. C.
1888.

Unless Schedule II., Rule 2 applies, these costs are to be regulated by the ordinary system. If Schedule II., Rule 2 applies, they are to be regulated by the ordinary system, as modified by Schedule II., Rule 2. The rules are part of Schedule I., and apply only to matters in Schedule I. Schedule I. deals with completed transactions, and the present items do not come under Schedule I.

The words “other business” in Schedule II., are words *ejusdem generis* with those preceding, and must be confined to conveyancing, as distinguished from other business: *Stanford v. Roberts* (1); *Ex parte O'Hagan* (2). The whole Act must be read in connection with the Conveyancing Act, which was passed the same year, of which it was the supplement; *In re Bann Navigation Act*, *Ex parte Olpherts* (3).

Ante, p. 319.

Mr. Cherry, in reply.

THE VICE-CHANCELLOR:—

Dec. 18,

The question before me arises before the operation of the Solicitors' Remuneration Act, and the General Order made thereunder. The items in dispute are for attendances and journeys from home, in respect of business not contentious and not conveyancing. The business with which the Act deals is therein expressed to be business connected with sales, purchases, &c., and other matters of conveyancing, and other business, not being business in any action, or transacted in any Court or Chamber, and not being otherwise contentious business. The 2nd Rule of the General Order follows the terms of the Act above mentioned, and divides the business into three classes—viz.: (a) Sales, purchases, and mortgages completed; (b) leases, and agreements for leases or conveyances, reserving rent, or agreements for the same, where the transaction shall have been completed; and (c) business not thereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is thereinbefore, or in Schedule I. thereto, prescribed, but which is not in fact completed; and other deeds or documents, including settlements, and “all other business,” the

(1) 26 Ch. Div. 155.

(2) 19 L. R. Ir. 99.

(3) 17 L. R. Ir. 168.

V. C.
1838.

remuneration for which is not thereinbefore, or in Schedule I. thereto, prescribed; and provides that the remuneration for such business is to be regulated according to the present system, as altered by Schedule II.

Schedule I. provides scales of charges for business of a conveying nature, and nothing else; and the rules appended to the Schedule are also conversant only with such business.

Schedule II. is headed "Instructions for drawing and perusing deeds, wills, and other documents."

It then gives a short table of charges for such business. Then comes a heading of "Attendances," the charge for which it fixes in ordinary cases, with a provision for extraordinary cases; and then comes a heading for "Abstract of title," with items of charges; and, lastly, a heading "Journeys from home," with items for charges in ordinary cases, and a provision for extraordinary cases.

The Taxing Master has ruled that the attendances and journeys in the present case do not come within these rules, and that, whether they come at all within the Act or not, they are to be taxed according to the general system of taxation, and that this system has not been altered in such cases by Schedule II.

There appears to me to be ground for contending that such business does not come at all within the Act. The words "other business," in Section 2, apart from the context, are, no doubt, large enough to include every kind of non-contentious business, and the result of this construction would be to authorise the taking all non-contentious business of every kind transacted by a solicitor for his client out of the existing system of taxation. This would be a very great change. It does not appear to be within the provisions of the Act, and can scarcely be supposed to have been contemplated, unless the words "other business," are not capable of any other reasonable construction restricting their application. The language of Kay, J., in *Stanford v. Roberts* (1), is of much importance on this question. The occasion on which this Act was passed, as put by him, must be taken into consideration, and it seems reasonable to suppose that the object of the Legislature was to compensate solicitors for the loss likely to be sustained by them through the changes made by the contemporaneous

Ante, p. 248.

statute, the Conveyancing and Law of Property Act, 1881. So far, therefore, as this consideration can be applied, it would require the words "other business" in Section 2 to be restricted to business *ejusdem generis* with the business specified in connection with such "other business"—namely, conveyancing business.

But supposing that this is not allowable, it is necessary to consider the operation of the General Order made under the Act. This Order professes to deal with all the business in respect of which rules are authorised to be made under Section 2. If "other business" is to be restricted, as I have said, there is no doubt that the items now in controversy are not within these rules. But if these words are not to be so restricted, still it is provided that the existing system is to apply to all "other business," unless so far as that system is altered by Schedule II. The heading of Schedule II. is dealt with by Mr. Justice Jay as applying to the whole Schedule, including attendances and journeys from home. These sub-headings can be given effect to by applying them to attendances and journeys from home, in respect of "instructions for drawing and perusing deeds, wills, and other documents."

Kay, J., suggested a difficulty in coming to this opinion, founded upon this, that while the rules profess to deal with all the business mentioned in the Act, even supposing that the words "other business" are used in the widest sense, still, when we come to look at the operative portions of the rules, we do not find on this restricted construction of them provisions for any but conveyancing business. I do not think that this is so in fact, as Rule 2 (c) does provide that this "other business," whatever it may be, is to be regulated according to the present system, as altered by Schedule II. If, then, business other than conveyancing business is supposed to be within the rules, it is expressly provided that the remuneration for it is to be regulated by the existing system. Has, then, the existing system been altered in respect of the class of business, now under my consideration, by Schedule II. ? I am not satisfied that it has been; and though the point is not free from doubt, I concur in the view which I understand Kay, J., to have entertained—an opinion that the whole of Schedule II. should be regarded as confined to conveyancing business.

V. C.
1888
Ante, p. 386.

A question arose in *Re O'Hagan* (1) upon this Act, and the rules made under it, which, though not directly in point, seems to me to have an important bearing on this question. The question was whether the costs of cases for counsel in business which was neither contentious nor conveyancing, and some other business of like nature, were to be taxed under this Act or under the general system. The Master of the Rolls had inquiries made as to the practice of the Taxing Master in England, and ascertained that cases for counsel had never been held by the Judges in England to come under the General Order made under the Act, and he stated that this was entirely in accordance with his own opinion. It does not appear whether the items then in controversy included either attendances or journeys from home; but the information as to the English practice and the opinion of the Master of the Rolls were general, and tend to support the view I have above expressed.

I shall therefore dismiss the application, with costs.

Solicitor for the appellant: *Mr. Strange.*

Solicitor for the Guardians: *Mr. Dunford.*

Q. B. Div.
1888.

Dec. 13, 17.

In re ATKINSON & SONS, Solicitors, and THE LURGAN TOWN COMMISSIONERS.

(*By permission*, from 24 L. R. Ir. 182).

(Before O'BRIEN and JOHNSON, JJ.)

Practice—Taxation of costs—Solicitors' Remuneration Act, 1881—Gen. Ord., 16th April, 1884, Sch. II.

Solicitors to Town Commissioners prepared sanitary regulations, collectors' and contractors' bonds, and warrants of attorney for their clients :

Held, by O'BRIEN, J. (affirming the Taxing Officer; *diss.* JOHNSON, J.), that such items were not within Sch. II., Rule 2, Gen. Ord., 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, sect 2, but should be taxed under the scale of fees prior to that Act.

Held, by JOHNSON, J., that such items were properly taxable under the scale settled by Schedule II., above referred to.

SUMMONS to review the Taxing Officer's certificate.

Q. B. Div.
1888.

Messrs. Atkinson & Sons, solicitors to the Lurgan Commissioners, furnished them their bill for miscellaneous costs, containing amongst others, the following items:—

	£	s.	d.	£	s.	d.
(86). Instructions to prepare regulations respecting dairies, and form of advertisement required by statutes and orders, - -	0	6	8	—		
(87). Drawing regulations as to same, 43 folios at 2s., - - -	4	6	0	2	7	0
(90). Engrossing same, 43 folios at 8d., - - -	1	8	8	0	15	8
(106). Contractors' bond for sewers—Instructions to prepare bond of M'Ilwain, as contractor for execution of work, - - -	0	6	8	—		
(107). Drawing same, 25 folios at 2s., - - -	2	10	0	1	0	0
(109). Instructions for contract to execute, along with bond, - - - -	0	6	8	—		
(110). Drawing same, 36 folios at 2s., - - -	3	12	0	1	7	0
(119). Attending at Lurgan, reading over contract to contractor and sureties, and witnessing and attesting execution, - - -	0	10	0	—		
(120). Do. do. bond, - - -	0	6	8	—		
(143). Collectors' bond—Instructions to prepare bond, - - - -	0	6	8	—		
(144). Drawing same, 24 folios at 2s., - - -	2	8	0	1	8	0
(147). Drawing warrant of attorney, 30 folios at 2s., - - -	3	0	0	1	10	0

Upon taxation the officer (Master Coffey) holding that these items were not business within the Solicitors' Remuneration Act, 1881, s. 2, deducted from items 87, 90, 107, 110, 119, 120, 144, and 147 respectively, the amounts stated in the second column, from which taxation the present appeal was taken. It appeared that the amounts fixed under the schedule to the Act would have been larger than the amounts allowed by the Taxing Officer.

J. Stanley, for Messrs. Atkinson & Sons:—

These items are within the Solicitors' Remuneration Act, 1881, section 2, and the General Order of 16th April, 1884, Rule 2, Schedule II., made thereunder, as they are items of conveyancing business.

[Counsel cited the judgment of the Master of the Rolls in *Ex Ante*, p. 386, *parte O'Hagan* (1).]

Q. B. Div.
1888.

J. Chambers, contra :—

This Act only applies to what is purely conveyancing business; it was passed in consequence of the alterations made in the length; &c., of deeds by the Conveyancing and Law of Property Act, 1881, actually receiving Royal assent upon the same day. It was not passed to increase solicitors' remuneration, as is sought to be done by its assistance in this case, but merely to keep up the standard of payment to what it was before in purely conveyancing business.

Ante, p. 248.

Ante, p. 294.

[Counsel cited *Stanford v. Roberts* (1), *In re Merchant Taylors' Co.* (2).]

Cur. adv. vult.

Dec. 17.

O'BRIEN, J. :—

A motion was made in this case to refer back for taxation certain charges of solicitors, on the ground that they came within the rules under the Solicitors' Remuneration Act, but were taxed on a different principle. Those charges consist substantially of two classes—first, for preparing regulations under the sanitary Acts, and, secondly, contracts with bonds and warrants of attorney for the performance of works by contractors for the local board. As to the first, it is hardly possible to see how, upon any construction of the rules, they can be brought, from the nature of the subject, within the description of "other documents" mentioned in the 2nd schedule. They are not documents at all, in any sense. They are not instruments between parties. They derive no force from the concurrence of other persons, and, indeed, but for the fact of having been prepared by solicitors, they could not be said to be properly solicitors' business at all. They are simply rules enforced by public authority, not on persons ascertained, but on those of the public to whom, in certain events, they may be applicable, and it is clear by no strain of meaning can be made documents within the schedule, even if we were to cease at the rule of *ejusdem generis* applied by the Master of the Rolls in the case that was cited to that tenor.

More difficulty attends the case of the contracts, bonds, and warrants, which are strictly, if standing alone, and without rela-

tion to any preceding enumeration documents in the ordinary sense. The point depends not only on the terms of the Statute, but also on the other question, whether the rules here carried out the statute. Section 2 authorizes rules to be made for the charges of solicitors, "in respect to business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action or transacted in any Court, or in the chambers of any judge or master, and not being otherwise contentious business." Now, the ordinary understanding of that would be that the Act first made provision for the business connected with conveyances of several kinds, ending with the general term of "matters of conveyancing," which would exhaust that subject, and had then dropped that subject, and had then gone on to another—the general business of solicitors—making an exception of the business in Court. But a different construction was sought to be maintained in *Stanford v. Roberts* (1); and it was contended *Ante*, p. 218. that the whole clause related to conveyancing simply, and notwithstanding the preceding words which seemed to finish that matter, that "other business" in the clause was business in the nature of conveyancing, and that the exception was of business which, though done in Court, was still capable of being conveyancing business.

That case was one for which that argument was necessary, because the business was a conveyance made in settlement of an action; and if this exception in section 2 were to be taken as an exception out of conveyancing business of any kind the charges were not within the schedule, whereas if it were an exception out of other business merely as distinct from conveyancing, the case was outside other business and the exception alike, and the Schedule II. applied. But Mr. Justice Kay held clearly that "other business" meant business other than conveyancing, and that the exception of business in an action was an exception from business other than conveyancing, and therefore the costs were governed by the schedule. And in this view his decision was sustained by the Court of Appeal: *In re The Merchant Taylors'* *Ante*, p. 294. *Co.* (2). But he treated it also as certain that whatever the

(1) 26 Ch. Div. 155.

(2) 30 Ch. Div. 28.

Q. B. Div.
1888. statute authorised, the rules that were made under it were adapted to conveyancing alone, and this, although section 2 of the rules takes up and repeats the very terms of the statute which would be taken ordinarily as an argument that the power given by the Legislature was intended to be executed in the extent given by it, just as the recital of a power in a deed would be used to construe the extent of the terms by which it was exercised. As

Ante, p. 248. the business in *Stanford v. Roberts* (1) was conveyancing proper, it was not, perhaps, necessary for the decision to hold that Schedule II. was confined to conveyancing merely. But if the other construction were held, it is clear that there is a large amount of solicitor's business which could not by any means be forced within the categories set out in that schedule. Take, for example, the case of administrator: his accounts, which are a usual species of work. The fact that in section 2 are used terms as large as the statute, while the schedules are more limited in extent, cannot, of course, be used to construe the statute, which was passed before they were made; and, as far as they are a judgment upon the terms of the statute, are opposed to the decision of Mr. Justice

Ante, p. 248. Kay in *Stanford v. Roberts* (2). On the other hand, the fact on which he dwells, that the Conveyancing Act was passed in the same session, not containing any reference to the other Act, cannot be used strictly to construe the latter, though it may have the effect of making the Court look more closely for what was the real intention of the statute in question. Now, there are several things in the statute itself and in the rules which seem to render it extremely difficult, if not impossible, to adopt any other conclusion but that conveyancing was the subject intended to be dealt with by one or both. In the first place, the Act expressly excludes the statute of 1870, enabling solicitors to make agreements with their clients, which, however, is not repealed, and therefore remains as applying to business generally.

The Act of 1881, moreover, provides for orders being made concerning such agreements, and in the meantime that solicitors shall be enabled to make agreements for the business to which that Act relates for payment of a gross sum or percentage, or otherwise, following, as to specific business, the same lines as the

(1) 26 Ch. Div. 155.

(2) 26 Ch. Div. 155.

Q. B. Div.
1888.

orders to be made. What is the meaning of one statute containing provisions within a more general one, and excluding the latter, unless it is intended to apply to a more restricted subject, such as conveyancing business? Further, the Act allows the solicitor to stipulate that the mode of payment shall not include disbursements made in respect of searches, plans, travelling, stamps, fees, or other matters, all particulars plainly relating to conveyancing. Again, the orders are to have regard to all or any of several considerations—namely, the position of the party for whom the solicitor is concerned, that is, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, or the like; and then it specifies several other circumstances, all of which must co-exist with some relation of the parties, so that the class of relations stated is carried into every case.

Turning to the rules and schedules, I agree in the view taken by the Master of the Rolls, that “instructions” in the 2nd schedule must be something distinct from “drawing,” &c., though connected with it in the heading, because the charge for the former is discretionary, while the allowance for the latter is fixed with, moreover, a discretion to increase it in special cases. But the charge next following is that for attendances, 10s. That plainly refers to attendances upon the execution of instruments, otherwise if the preceding part referred to the business generally of solicitors, the traditional charge for attendances would be altered in all cases, a change so great in what is, perhaps, the largest part of a solicitor’s business, that it could not possibly have been intended. Lastly, if we look at the 6th rule relating to the notice which a solicitor can give to the client, we find that it is a notice alone as to business falling within the 1st schedule, which is strictly conveyance, and by it he can require to be paid his ordinary costs, as altered by Schedule II., which shows that Schedule II. also applies to conveyancing business, that is, the kind of business in which the alienation or control of property is the inherent idea. For these reasons, I am of opinion the Taxing Officer was right in the view he took, and that the application cannot be granted.

Q. B. Div.
1888.

JOHNSON, J. :—

This summons involves a question of considerable difficulty on the construction of the General Order of 16th April, 1884, under the Solicitors' Remuneration Act, 1881.

It is contended that work done by solicitors for Town Commissioners (the sanitary authority for the town of Lurgan), and charged in the bill of costs as Nos. 87 and 90, for drawing and engrossing regulations respecting dairies and cow-sheds, and advertisements as required by statutes and orders; No. 110 for drawing contract for sewer work; Nos. 107, 144, and 147 for drawing contractor's bonds for said work, and a warrant of attorney; Nos. 119 and 121 for attendances for reading and explaining and attesting execution of the contract, and bonds, and warrant, ought to be taxed under the scale prescribed by the Solicitors' Remuneration Act, 1881, and the General Order, Rule 2, Schedule II.

These charges have been taxed by the Taxing Master under the present system simply—not as altered by Schedule II.; and to an amount less than what is allowed by the scales in Schedule II.

Antr., p. 248.

Ante., p. 294.

After the decisions in *Stanford v. Roberts* (1), and *Re Merchant Taylors' Co.* (2), it must, I think, be taken that the Solicitors' Remuneration Act, 1881, Section 2, authorises General Orders for prescribing and regulating the remuneration of solicitors in respect of two branches of business—1, “in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing” (that is matters of conveyancing besides those previously enumerated); and 2, “in respect of other business” (that is business other than conveyancing business) “not being business in any action, or in a Court or Chambers, and not being otherwise contentious business;” and that the General Order, Rule 2 (subject to an exception in Rule 1, which does not affect the present question), although it follows literally the Act, Section 2 (with the omission of the words, “and not being otherwise contentious business”) prescribes remuneration only for business within the first branch. The question is, what is the scope of the remuneration which is prescribed under Rule 2? It is to be regu-

(1) 26 Ch. Div. 155.

(2) 30 Ch. Div. 28.

lated as prescribed in the three divisions, “(a), (b), and (c),” respectively: Q. B. Div.
1888.

“(a). In respect of sales, purchases, and mortgages completed.” The remuneration for this work is to be regulated by Schedule I., Part I.:

“(b). In respect of leases and agreements for leases, or conveyances reserving rent or agreements for the same when the transactions shall have been completed.” The remuneration for this work is to be regulated by Schedule I., Part 2.

(c). After providing for business in transactions not completed, proceeds: “and in respect of other deeds or documents, including settlements” (a word omitted in Divisions *a* and *b*), “and of all other business, the remuneration for which is not hereinbefore or in Schedule I. prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II.” The charges now under consideration can only come under this order if they fall within Rule 2, Div. (c), Schedule II. This schedule is headed “Instructions for drawing and perusing deeds, wills, and other documents;” but this is not the limit of the scope of Schedule II., because *In re O’Hagan* (1) decides that “instructions for drawing” are dealt with only in the first paragraph commencing “such fees for instructions, &c.,” and that the scales under the heading “In ordinary cases as to drawing, &c.,” refer to charges for drawing, engrossing, and perusing deeds, wills, and other documents, of which an illustrative but not exhaustive enumeration is given in the judgment in that case. “*Document*” is a very comprehensive term, but it is not a term of art. *Ante*, p. 386.

After the scales for drawing, &c., follows “attendances,” which, I think, must be limited to attendances in respect of the matters in the previous part of the schedule; and then after reserving to the Taxing Master a discretion, in extraordinary cases, to increase or diminish the scale charges, Schedule II. proceeds with a scale for “abstracts of title” (where not covered by the above scales). An abstract of title is not a deed or a will, or anything of a similar kind, but in order to be “covered by the above scales,” it must fall within the class or category which Rule 2, Division (c), describes as “other deeds or documents, including settlements, and all other

Q. B. Div.
1888.

Ante, p. 248.

business the remuneration for which is not hereinbefore or in Schedule I. prescribed." The question then seems to be reduced to this—are the charges in question such as in the language of Mr. Justice Kay, in *Stanford v. Roberts* (1), are "ordinarily known as conveyancing business," within the above class or category in Rule 2, Div. (c), Schedule II. ?

In standard books of precedents in conveyancing, such as Bythewood and Davidson, are, of course, to be found precedents for contracts and agreements under and not under seal, bonds of which the conditions often require skill and care in drafting, and warrants of attorney: these all appear to form part of what is ordinarily known as conveyancing business. The regulations and the forms of statutory advertisements present more difficulty; they are rather in the nature of bye-laws and advertisements of bye-laws; but these also require in drafting skill, precision, and conciseness, and involve no little responsibility. Having regard to the comprehensive nature of the words before referred to in Rule 2, Div. (c), they might, I think, not inappropriately be classed as conveyancing business, and they seem to be as much "covered by the above scales," Schedule II., for drawing and engrossing, as an abstract of title is.

I therefore think that the charges in question in the bill of costs ought to be referred back for taxation according to the present system, as altered by Schedule II. but as Mr. Justice O'Brien is of the contrary opinion, I withdraw my opinion, and the summons will be discharged.

Application refused.

Solicitors for the appellants: *Atkinson & Son.*

Solicitor for the Commissioners: *Hugh Hayes.*

In re UNITED KINGDOM LAND AND BUILDING
ASSOCIATION.

Chitty, J.
1888.

Dec. 19.

(*By permission, from 40 Ch. D. 471; s. c. 37 W. R. 486.*)

Winding-up—Official Liquidator—Employment of Solicitor—Taxation—Solicitors' Remuneration Act, 1881, Gen. Ord., August, 1882, r. 6.

On receiving notice from the solicitor, whom he has employed to act for him in the winding-up, that he elects to be paid for his work under Schedule II., and not according to the scale charge under the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, it is the duty of the Official Liquidator, in order to discharge his duty of protecting the assets of the company, to obtain the direction of the Judge in Chambers as to whether he ought continue to employ a solicitor who requires payment on the more expensive footing.

ADJOURNED SUMMONS for review of taxation.

The United Kingdom Land and Building Association was ordered to be wound-up compulsorily on the 3rd of August, and on the 1st of September, 1887, H. C. Sargent was appointed official liquidator. The official liquidator, by memorandum in the usual form, appointed Montagu Hawkins as his solicitor in the matter, and on the 2nd of November, 1887, Mr. Hawkins, by writing under his hand, duly gave the official liquidator notice, pursuant to the General Order under the Solicitors' Remuneration Act, 1881, rule 6, that he elected that his remuneration for work done in connection with the sale, or offering for sale, of the leasehold property of the Company should be under Schedule II. of the Order, and not by scale charge under Schedule I.

This notice was accepted and adopted by the official liquidator, in the belief that he had power to do so without reference to the Court; and also that, having regard to the circumstances of the case, and especially to the fact that the leasehold property of the Company was situated at Swindon, and was subject to various incumbrances of a complicated nature, the notice was fair and reasonable.

An order was obtained for the sale of a portion of the property, and on the 14th of December, 1887, a sale was effected.

The Taxing Master having taxed Mr. Hawkins' bill of costs in respect of this sale on the scale charge in accordance with

Chitty, J.
1888.

Schedule I., which reduced the amount of the bill as calculated upon Schedule II., the objection to the taxation was taken by the official liquidator that the solicitor had given notice of his election to be remunerated according to Schedule II.

In answer to this objection, the Taxing Master replied that the official liquidator was an officer of the Court, and that in sales under the direction of the Court, the Court (through the Chief Clerk) fixed the amount of remuneration, and that the solicitor should have applied to the Court for leave to give such notice, if he desired to take his remuneration out of the fixed scale, and that he could not make the higher charge without such permission. Further, that it was the duty of the official liquidator to protect the creditors, and get the business done as inexpensively as possible; that other competent solicitors would have undertaken the work for the scale fee, and that the official liquidator ought not voluntarily to increase the expenses of sale by submitting to the notice, without first ascertaining that other solicitors would not accept the scale charge.

The matter now came on by adjournment from Chambers upon two summonses by the official liquidator: (1) for the allowance of the objections to the taxation, and for a reference back to the Taxing Master to vary his certificate accordingly; and (2) that the acceptance and adoption by the liquidator of the solicitor's notice of the 2nd of November, 1887, might be confirmed.

Romer, Q.C., and W. M. Cann, in support of the summonses:—

The official liquidator is not supposed to come to the Court for instructions how to act as soon as he receives a notice from his solicitor that he elects to be paid on the old system (Schedule II.) for work done in the liquidation. The solicitor is clearly entitled to elect under which system he will be paid, and this is a matter of which the official liquidator was not ignorant, while he also knew that the solicitor whom he had retained had special knowledge with reference to the leasehold properties to be realised, which made it worth while to employ him on his own terms. Having acted in perfect good faith, the official liquidator ought to be allowed to fulfil his agreement as to the remuneration of his solicitor. We submit, therefore, that the Taxing Master has

proceeded on a wrong principle, and that the objections to the taxation ought to be allowed.

Chitty, J.
1888.

CHITTY, J.:—

This is an application by the official liquidator, who is bound to protect the estate, for a review of the Taxing Master's certificate on the ground that the Taxing Master has allowed scale charges only to the official liquidator's solicitor, whereas, it is contended, the taxation ought to proceed on the non-scale charge, which, it appears, would give the solicitor a higher remuneration than the scale charge.

Consequently, the official liquidator, who is bound, as I have said, to protect the estate, comes here to ask that the estate may pay more than the Taxing Master has allowed.

Of course, it is obvious that this is the solicitor's application in the name of the official liquidator.

On the day after the formal appointment by the official liquidator of the solicitor to act for him, the solicitor gave notice that he elected that the remuneration for work done with regard to certain leaseholds should be under the non-scale charge. The question is, what ought the liquidator to do under those circumstances? It is his duty to protect the estate, again I have to say that, and he must therefore act as any prudent man would do; and any prudent man receiving such a notice would look into the matter, and enquire of a solicitor, who would be bound to give him advice on the subject, and explain what the meaning of such a notice was. And if the liquidator did not understand it he, of course, could easily come to understand it by applying to the Judge in Chambers.

But if he did understand it, and he found that the result would be that the solicitor would get a larger remuneration, it was *a fortiori* his duty to come and ask the Judge in Chambers what course he should take. Then the matter would have been looked into. I say this, not only upon the considerations that I have already mentioned, but because it is well known that the official liquidator and the solicitor work together, and there is a good deal of *finesse*—I do not say it is wrong at all—in these liquidations; either the liquidator finding the solicitor, or the solicitor finding the liquidator, and each in turn acting so as to give the other remuneration—I do

Chitty, J.
1888.

not say it is other than fair and just remuneration—for his services. Now, if the official liquidator had brought this matter before the Judge in Chambers it would have been looked into, and it would probably have been ascertained what the result has shown—viz., that the amount of remuneration on the non-scale charge would be larger than the amount on the scale charge, and then at once it would be suggested to the official liquidator, who could only, it must be recollected, appoint his solicitor with the leave of the Judge in Chambers: “If this solicitor will not do it, see if you cannot get some other respectable solicitor to do it on the scale charge, and then it will be known exactly how much or how little will have to be paid, and there will be no trouble in ascertaining what the amount of the charge is.” At any rate the matter would be looked into, and I consider it was the duty of the official liquidator to get the assistance of the Judge in Chambers under these circumstances, but he did not do it.

. The Taxing Master has taxed, quite rightly I think, upon the scale footing, because it is a taxation, not against the liquidator, who is not liable, but for the purpose of seeing how much the solicitor is to get out of the estate. I think the estate must be protected in the manner which the Taxing Master has thought right, by taxing the solicitor’s bill so as to give him remuneration according to the scale. I have never yet known, and I shall be glad when I find, the case of a solicitor who has taken a scale charge coming to the Court and saying: “I find that in this particular matter the scale charge remunerates me to a larger amount than the estate should pay.” Such a thing, of course, might happen, but I should like to see it. The real meaning of a notice of this kind is almost plain on the face of it—viz., “I am going to get more by being remunerated in that way than by being paid according to the scale fee.” Now the solicitor acting in the name of the liquidator has two summonses: one to review, and the other that the liquidator may now be allowed to consent to the notice *nunc pro tunc*. The result is that I think the Taxing Master is right, and I decline to send the certificate back to him to be reviewed, and I do not allow the costs of this application out of the estate.

Nothing, of course, that I have said interferes with the right of

the solicitor to give such a notice under the Rules of the Solicitors' Remuneration Act, 1881. *Chitty, J.*
1888.

Solicitor: *Montagu Hawkins.*

In re LOVE;

Stirling, J.
1889.

HILL v. SPURGEON.

Jan. 16, 22.

(By permission, from 40 Ch. D. 637; s. c. 37 W. R. 475, 60 L. T. 254.)

Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44)—General Order, August, 1882, Rule 6—Right to elect—Pending Business.

The right of a solicitor under Rule 6 of the General Order in pursuance of the Solicitors' Remuneration Act, 1881, to elect that his remuneration shall be according to the old system as altered by Schedule II., may be exercised as to business pending at the time when the Order came into operation, and in such case the election may be made after the time when the Order came into operation, but must be made before any further work is done by the solicitor to which the scale charges, under the Order, would apply.

The judgment in an administration action contained no general direction for the sale of the testator's real estate, but under various separate orders made in the action, and before the Order under the Solicitors' Remuneration Act came into operation, sales and leases of parts of such estates were directed or sanctioned. After the Order came into operation, the plaintiff's solicitor gave him notice that in all matters relating to the estate he proposed to charge according to the old system as altered by Schedule II.

In determining the sufficiency of this notice, it was held that the separate transactions ought in the taxation of the costs to be treated and dealt with as separate matters, and that the business ought not to be deemed to be "undertaken" until the time arose at which the solicitor had done some work after the Order came into operation, which would be covered by the scales under the General Order.

ADJOURNED SUMMONS.—In this action, which was brought on the 8th of August, 1881, by one of the executors and trustees of the will of William Love, against the other executor and trustee, who was also the residuary legatee, for the administration of the real and personal estate of the testator, judgment was given on the 14th of January, 1882, and thereby certain accounts and inquiries

Stirling, J. 1889. "were ordered, but no directions were given for the sale of the real estate.

The action came on for further consideration on the 30th of January, 1885, and by the order then made (as subsequently varied by the Court of Appeal) directions were given for the taxation of the costs of the plaintiff and defendant as between solicitor and client, including in such costs any charges and expenses properly incurred by them respectively in or about the administration of the estate of the testator, or the execution of the trusts of his will, beyond their respective costs of the action; and the order further directed that certain specified properties should be sold with the approbation of the Judge, and that the plaintiff should have the conduct of such sale.

In the meantime, between the date of the judgment and that of the order on further consideration, the Court had by various orders made in the action either directed or sanctioned the sale or lease of various portions of the testator's real estate.

The conveyancing business connected with the sales and leases so directed or sanctioned was conducted by the solicitor of the plaintiff, and the charges in the plaintiff's bill of costs relating to such conveyancing business were separately taxed by the Master under the order on further consideration.

The Solicitors' Remuneration Act was passed on the 22nd of August, 1881. The General Orders made in pursuance of that Act were issued in August and published in September, 1882, and came into operation from and after the 31st of December, 1882.

The above-mentioned conveyancing business was in every instance undertaken and commenced before the date when the General Order under the Solicitors' Remuneration Act, 1881, came into operation, and part of such business was undertaken and commenced before the date of the judgment in the action.

The General Order aforesaid provides, in Rule 6, that in all cases to which the scales prescribed in Schedule I. thereto shall apply, "a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no election shall be made, his remuneration shall be according to the scale prescribed by this Order."

On the 2nd of January, 1883, the plaintiff's solicitor, Mr. Henry D. M. Page, handed to the plaintiff a letter bearing that date, in the following terms :—

Stirling, J.
1889.

“Dear Sir,

“*Love* deceased,

“As you may possibly be aware, the Rules under the Solicitors' Remuneration Act came in force yesterday, and unless notice be given solicitors must now charge for all conveyancing work by commission. This would be very inconvenient and almost impossible way of charging in this case. I therefore beg to give you the formal notice required by the rules that in all matters relating to this estate I propose to charge my costs under Schedule II. of those rules.

“Yours faithfully,

“HENRY D. M. PAGE.

“W. B. Hill, Esq.”

The conveyancing charges of the plaintiff's solicitor were accordingly made under the old system as altered by Schedule II., but the Taxing Master in taxing them under the Order on further consideration held that the plaintiff's solicitor was not entitled to costs so made out, and taxed his charges according to the scale in Schedule I., Part I. of the Order under the Act of 1881.

The plaintiff then carried in objections to the taxation, and submitted that the letter of his solicitors, dated the 2nd of January, 1883, was an effectual notice of election in compliance with Rule 6 of the General Order, and that the solicitor was entitled to charge and to have his conveyancing costs taxed according to the old system, as altered by Schedule II.

The Taxing Master overruled the plaintiff's objections, and gave his reasons for so doing at considerable length. It appeared that he was under the impression that the judgment of the 18th of January, 1882, had directed the sale of all the testator's estate, and his reasons were, in effect—first, that the plaintiff's solicitor was too late in giving notice of his election, because, even if he could elect as to pending matters, he ought to have given the notice as soon as possible after the General Order was issued, or at all events not later than the day it came into operation; and secondly,

Stirling, J.
1889.

that the letter of the 2nd of January, 1883, was not in point of form a sufficient and proper notice, having regard to the fact that the client was a trustee; and he made the following statement:—
“The following are the facts in the case which appeared to me sufficient to render the notice of election too late. They relate to matters commenced after the Act and before the Orders:—

“1. As to the sale of Caledon House. This had been in progress from the 10th of December, 1881, and there are various charges relating to this during the months of September, October, and December, all after the Orders were made; and on the 1st of January, the day on which the Orders came into operation, and the day before the letter communicating the election was written, a letter was written on this business to the solicitors of the plaintiff's co-trustee, and another letter was also written on this day to the purchaser's solicitors.

“2. The sale of Stanley Villas to the Star Life Assurance Society. This commenced in December, 1881, and there are charges in September, October, November, and December, 1882, and, as in the last case, a letter written on the 1st of January, 1883.

“3. The lease of Cromer House to Mr. Saltmarsh commenced in October, 1882, after the General Orders were made, and concluded in November, before they came into operation.

“4. Two leases granted to the trustees of the testator's will commenced in June, 1882, after the Orders were made, and the charges for perusing the drafts are on the 2nd of January, 1883, the day after the day on which the Orders came into operation, and on the same day that the letter was written communicating the election.

“5. The sale of Bonnington House commenced April, 1882, and completed in July, 1884, and there are charges in September, October, November, and December. On the 31st of December, 1882, a letter was written on the subject of the sale, and on the 2nd of January, the day on which the notice of election was given, another letter was written.

“6. Lease to Bell. Commenced July, 1882, and completed in November, 1883. There are charges in September, October, November, and December, and then one for an attendance in

January, 1883, without a date, but the next item is the 4th of January. *Stirling, J.*
1889.

“It therefore appears that much conveyancing business was done between the making of the Orders and their coming into operation, and continued on the day they came into operation and the following day, on the last of which the notice of election was given. It will be observed that the notice to the client of election applies generally to all matters relating to the estate, and consequently, if too late as regards any matter, it was too late for all.”

The plaintiff then took out a summons that his objections to the taxation might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly, and this summons was now adjourned into Court.

E. Ford, for the plaintiff, in support of the summons :—

The question which the Court has to decide is, whether an election by a solicitor made under Rule 6 of the General Order in pursuance of the Act of 1881, immediately after the 1st of January, 1883, when that Order came into operation, is valid and sufficient with regard to business then pending. A solicitor is empowered by that rule to elect “before undertaking any business” that his remuneration shall be according to the old system as altered by Schedule II.; and it has been held in *In re Field* (1), that the General Order applies to business commenced before it came into operation. *Ante*, p. 278. In that case the solicitor had not declared his election that his remuneration should be according to the old system as altered by Schedule II.; and Lord Justice Cotton, in the course of his judgment, said: “It may be that if a solicitor, after the rules came into operation, gave notice that he elected to have remuneration for business then pending according to the old system as modified by Schedule II., we should hold such a notice effectual. Here the solicitor did nothing of the kind, for he claimed percentage under the rules, and we cannot get out of Section 7. It has been decided in *In re Lacey & Son* (2) that the rules apply to pending business.” *Ante*, p. 248.

In the present case the business was in every instance begun before the 1st of January, 1883, and the solicitor exercised his

(1) 29 Ch. D. 608, 614.

(2) 25 Ch. D. 301.

Stirling, J.
1889.

right of election on the 2nd of January, 1883. So far as time is concerned the right was properly exercised, for the time to exercise a right must be after the rule which gives the right has come into operation, and the day after that happened was surely a reasonable time for giving the notice. Moreover, the notice was sufficient in point of form, for the word "propose" was equivalent to "elect." Again, although the notice covered conveyancing business done under the various orders made in the action, there is no difficulty in treating separately the business done under each separate order, and the election was at any rate valid in the cases where no work was done after the rules came into operation. The business connected with the case of Cromer House was finished, except as to taxation, before the 1st of January, 1883, and consequently was not "pending business" at that time.

S. Dickinson, for the defendant:—

Under Rule 6 a solicitor can only elect "before undertaking any business." Here all the business was undertaken before the delivery of the letter which is relied upon as constituting the election, and also before the Rule 6 came into operation. The wording of that rule is distinct, and the observations of Lord Justice Cotton in *Ante*, p. 278. *In re Field* (1), which do not amount to a *dictum*, but only put a hypothetical case, cannot be taken as abrogating the rule.

Ante, p. 316.

[He referred to *Humphreys v. Jones* (2).]

Ante, p. 290.

Ante, p. 248.

Ante, p. 348.

Ante, p. 360.

E. Ford, in reply, cited *Fleming v. Hardcastle* (3); *In re Lacey and Son* (4); *In re Allen* (5); *Hester v. Hester* (6).

Jan. 22.

STIRLING, J.:—

This is a summons raising questions not altogether free from difficulty with reference to a solicitor's right to remuneration, having regard to the provisions of the Solicitors' Remuneration Act, 1881, and the General Order which has been made in pursuance thereof. In order that I may explain the view which I take of those questions I must begin by stating some of the facts,

(1) 29 Ch. D. 608.

(2) 31 Ch. D. 30.

(3) 33 W. R. 776.

(4) 25 Ch. D. 301.

(5) 34 Ch. D. 433.

(6) *Ibid.* 607.

all the more that they do not seem to have been quite accurately laid before the Taxing Master. [His Lordship then stated the facts of the case and continued:—]

Stirling, J.
1889.

All the matters of business to which the taxation related were undertaken by the plaintiff's solicitor before the 31st of December, 1882, and the first question I have to consider is whether the solicitor had under Rule 6 of the General Order a right to elect to be remunerated under the system which prevailed before the Order came into operation. Now, it was decided in *In re Field* (1) that the Order made under the Solicitors' Remuneration Act applied to business which had been commenced before the Order came into operation. In dealing with that question Lord Justice Cotton, after reading Rule 6 of the General Order, said (2): "Here it was said that the solicitor could not exercise his option because the business was in full swing before the rules came into operation, and that the scale therefore could not apply. This argument is forcible, but I think it cannot prevail when we look at the 7th Section of the Act: 'As long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby.' No doubt the application of the Act to pending business alters the contract under which the business was undertaken, but this alteration may in some cases be for the benefit of the solicitor." I stop there for the present. Lord Justice Lindley also said (3): "Perhaps the most difficult question is whether the rules apply at all to pending business; but Section 7 of the Act satisfies me that they are applicable." And Lord Justice Fry said (4): "I am of the same opinion. I think that Section 7 of the Act declares in substance that the Act shall apply to all bills which are taxed while any General Order is in force. If the Act had not been intended to apply to pending business, different language would have been used." Therefore, all the learned Judges constituting the Court of Appeal rely on Section 7 of the Act, "as long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby."

That being so, we must look at the General Order. Now, I

(1) 29 Ch. D. 608.

(3) 29 Ch. D. 616.

(2) *Ibid.*, 614.

(4) *Ibid.*

Stirling, J.
1889.

apprehend that the Order might have been framed in express terms, so as to distinguish between the two classes of business—namely, business which was undertaken before the Order came into operation and business which was undertaken afterwards. It might have provided, for example, in express terms: “This Order shall not apply to any business undertaken before this Order came into operation, and shall only apply to business undertaken after it comes into operation,” or it might have said in express terms: “This Order shall apply to all business whether undertaken before or after the date fixed for the Order coming into operation.” But

Ante, p. 278.

there is no express provision in the Order on the subject, and therefore it is a matter of construction which way the Order is to be read; and the Court of Appeal in *In re Field* (1) have settled that it is to be read as including business undertaken before the Order came into operation, as well as business which is undertaken afterwards. That being so, I have to deal with Rule 6, and that rule must, I apprehend, be read with reference to the construction put

Ante, p. 278.

on the Order by the Court of Appeal in *In re Field*. It begins: “In all cases to which the scales prescribed in Schedule I. hereto shall apply,” and I am to read that as including cases where the business was undertaken before the Order came into operation, as well as cases in which the business was undertaken subsequently to the date fixed by the Order for its coming into operation. Then it proceeds: “A solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto.” Now, if the words, “before undertaking any business,” are to be read as limited to the absolute commencement of the business before any work is done which the scale charges would cover, it is impossible to give that rule a sensible meaning as applied to business undertaken before the rule came into operation. If the right of election does not apply to business undertaken before the Order came into operation, it would, as is pointed out by Lord Justice Cotton, be a forcible objection to the construction which the Court of Appeal has decided is to be put on that Order. I must therefore, if I can, read Rule 6 in such a way that it shall not involve an impossibility when applied to busi-

ness undertaken before the date of the Order. It seems to me that it is possible to put such a construction upon it. In fact, if the rule is read as if the words, "subsequently to this Act coming into operation," were inserted before the words, "before undertaking any business," so that it would run: "In all cases to which the scales prescribed in Schedule I. hereto shall apply, the solicitor may, subsequently to this Act coming into operation, and before undertaking any business by writing under his hand," elect, and so forth, it seems to me that justice would be met and that a rational interpretation could be put on the Order, and one which is not contrary to the whole scope of it, as interpreted by the Court of Appeal. That agrees with the suggestion which is made by Lord Justice Cotton in the passage which immediately follows that which I have read, where he says (1): "It may be that if a solicitor, after the rules came into operation, gave notice that he elected to have remuneration for business then pending according to the old system as modified by Schedule II., we should hold such a notice effectual." That is no more than a *dictum*, but, so far as it goes, it is in favour of the view of construing the rule in the way in which I have thought proper to construe it.

Before passing from that, I ought to notice one remark which is made by the Taxing Master—namely, that the time which ought to be considered is not the date at which the Order is to come into operation, but the date at which it was made, which was several months before the 31st of December, 1882, after which day it was to come into operation. Having regard to the ground which was adopted by the Court of Appeal in *In re Field* (2)—namely, that *Ante*, p. 278. Rule 6 must be read with the 7th Section of the Act, I do not think that that is the proper moment at which we ought to look. Having regard to that section, I think the dividing line is to be drawn, not at the date when the Order was made, but at the date when it came into operation. Then it is settled by the decisions in *In re Allen* (3) *Ante*, p. 348. and *Hester v. Hester* (4) that the words, "before undertaking any *Ante*, p. 360. business," mean before the solicitor does any work which the scale charges would cover. Therefore I think, upon the construction of the rule, that the solicitor was at liberty to give a notice of election

(1) 29 Ch. D. 614.

(2) *Ibid.* 608.

(3) 34 Ch. D. 433.

(4) *Ibid.* 607.

Stirling, J.
1889.

after the 31st of December, but that he was bound to do so before he did anything which was covered by the scale charges.

Then the next question which I have to consider is, whether the notice which he gave on the end of January, 1883, was sufficient. [His Lordship read the letter of that date, and continued:—] It is said by the Taxing Master that it is not sufficient, because the solicitor uses the word “propose” instead of the word “elect.” I do not think that that argument ought to prevail. It seems to me that you must look at the substance of the letter. It contains a distinct reference to the rule, and is an intimation to the client that he intends to avail himself of the advantage which is given to the solicitor by that rule. That seems to me to be sufficient.

Then I have next to consider whether these conveyancing matters form separate matters of business, or whether they are all to be treated as one, and under the circumstances of this case I think they ought to be treated as several. The case is different from that which it was supposed to be by the Taxing Master. The Taxing Master appears to have thought that the work was all done under one direction given for sale of the testator's estate. In point of fact, each matter was the subject of a separate order by the Court, and was begun at a different time, and some of the matters were begun before even judgment in the action. I think, therefore, whatever might have been the case if the work had been all done pursuant to a direction giving the plaintiff the conduct of the sale of the testator's real estate, that in this particular case the separate transactions ought to be treated as separate matters, and that, as the Act applies to matters of conveyancing arising in an action, each matter ought to be dealt with separately, and the business ought not to be deemed to be undertaken until the time arises at which the solicitor has done some work which would be covered by the scales.

Now, I have to apply these principles to the six matters of conveyancing which are dealt with by the Taxing Master's certificate. The first is the sale of Caledon House. He finds that this has been in progress from the 10th of December, 1881, and after stating the various charges in the months of September, October, and December, there is also one on the 1st of January, the day on

Stirling, J.
1889.

which the Order came into operation. We therefore find that on the 1st of January, and before the notice was given, the solicitor did work which was covered by the scale charges. I think, therefore, that in this respect the Taxing Master was right, and his decision cannot be disturbed. The same applies to the next, the sale of Stanley Villas to the Star Life Assurance Society. It commenced in 1881; there are charges in September, October, November, and December, 1882, and, as in the last case, a letter written on the 1st of January. Therefore, as regards that, his decision cannot be disturbed. The third is the lease of Cromer House to Mr. Saltmarsh in 1882, concluded in November, before the Orders came into operation. There nothing has been done to prevent the solicitor from electing. Therefore, as regards that, I think the Taxing Master's decision was not right, and that must go back to him for reconsideration.

As regards the items comprised in No. 4, they were commenced in June, 1882, and completed in March, 1883, and there are charges in November and December, 1882, and a charge for perusing the draft on the 2nd of January, 1883. Then as regards Bonnington House, No. 5, that was commenced in April, 1882, and completed in July, 1884, and there are charges in September, October, November, and December; on the 31st of December, 1882, a letter was written on the subject of the sale, and on the 2nd of January, the day on which the notice of election was given, another letter was written. It is stated that the solicitor has not proved that the letter of the 2nd of January was subsequent to the letter communicating the election. As regards the 4th and 5th matters, I think they must go back to the Taxing Master, and he must inquire whether the work which is charged for on the 2nd of January was done before or after the notice was communicated to the client. As regards the 6th, there is an attendance in January, 1883, without a date, prior to the 4th of January in that year; that leaves it uncertain whether it was the 1st, 2nd, or 3rd of January. There, again, I think it must go back to the Taxing Master, and he must find out when that attendance took place, whether it was before or after the notice was communicated to the client.

I have now dealt with all the conveyancing matters; and I think,

Stirling, J.
1889. having regard to the nature of the case, that the costs of both parties must be costs in the action.

Solicitors: *Darley & Cumberland*, agents for *H. D. M. Page*,
Southampton; *Janson, Cobb, Pearson & Co.*

Chitty, J.
1889.

Jan. 18.

In re MARSDEN'S ESTATE ;
WITHINGTON *v.* NEUMANN.
(1885 M. 432.)

(*By permission*, from 40 Ch. D. 475; s. c. 58 L. J. Ch. 260.)

Interest on Costs—Solicitors' Remuneration Act, 1881, General Order, Rule 7—Administration Action—Costs payable out of Fund—1 & 2 Vict., c. 110, ss. 17, 18 (Revised Ed. Statutes, vol. viii., p. 372)—23 & 24 Vict., c. 127, s. 27 (Revised Ed. Statutes, vol. xiii., p. 881)—Rules of Supreme Court, 1883, Order XLI., Rule 3; Order XLII., Rule 16.

Where, in an administration action, costs have been directed to be taxed, and when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special direction, payable on the costs.

MOTION to discharge, or vary, a decision in Chambers refusing to make an order for payment of interest at 4 per cent. on two sums certified to be due to the plaintiff for her costs in an administration action.

On the 26th of January, 1883, the action was commenced by Ellen Withington, a beneficiary, for administration of the estate of the testator, Richard Marsden, and by the judgment of the 7th of July, 1883, the usual inquiries were directed.

The order on further consideration, dated the 29th of July, 1885, directed taxation of the costs of the plaintiff and of the defendants (the trustees and executors) of the action, the costs of the defendants to be taxed as between solicitor and client, and to include any charges and expenses properly incurred by them as executors and trustees of the will; the defendants to be allowed one set of costs only, and the Taxing Master to certify to whom and in what proportion such

last-mentioned costs were payable; and it was ordered that such costs when taxed be retained and paid by defendants out of the testator's estate generally, with liberty to apply as to the sale of testator's leasehold estate and as to raising and paying subsequent costs.

On the 12th of April, 1886, an order was made in Chambers, on the application of defendants, for partition of the leasehold estate and appointment of new trustees, and for taxation of the costs of plaintiff and of defendants of that application and relating thereto and consequent thereon, and of the conveyances and indentures appointing new trustees to be made and executed under the order: "The costs of the defendants to be taxed as between solicitor and client, and to include any costs, charges and expenses properly incurred by them in the action, or in or about the execution of the trusts of the testator's will, not being costs in the action; such costs when taxed to be raised and paid in like manner and out of the same funds as the costs directed to be taxed and raised and paid by the order of the 29th of July, 1885." And, subject to the raising and payment of the costs, the order directed the transfer of the trust funds to the persons beneficially entitled. Under this order the defendants had transferred some of the shares to the persons beneficially entitled.

By the Taxing Master's certificate of the 20th of December, 1886, the plaintiff's costs under the first order were certified at £174 3s. 9d., and by the certificate of the 27th of January, 1888, the plaintiff's costs under the second order were certified at £168 0s. 2d.

On the 2nd of November, 1888, these costs were paid to plaintiff's solicitors, and accepted by them without prejudice to their claim for interest from the dates of the certificates. On the 7th of November, 1888, a summons was issued on behalf of the plaintiff for payment of interest on the costs, but was dismissed by his Lordship in Chambers, with costs, on the 10th of December, 1888.

Plaintiff now moved that the decision in Chambers might be discharged or varied, and that the defendants be ordered to pay to plaintiff or her solicitors interest at 4 per cent. from the 20th of December, 1886, on the sum of £174 3s. 9d. certified to be due to her for costs by the certificate of that date, and also interest from the 27th of January, 1888, on the sum of £168 0s. 2d. certified to

Chitty, J.
1889. be due to the plaintiff for costs by the certificate dated the 27th of January, 1888.

Macaskie, in support of the motion, tendered an affidavit by one of the plaintiff's solicitors, sworn on the 30th of November, to the effect that he had attended on the second taxation, and complained to the defendants' solicitors of the non-payment of the costs previously taxed, and stated that he should require interest thereon and on the costs then taxed if not promptly paid. The affidavit also called attention to the delay of the trustees in carrying out the orders and in winding up the estate, and set out a correspondence on the subject. It did not appear that this affidavit had been used in Chambers.

[CHITTY, J., after some discussion, declined to admit the affidavit.]

Macaskie: By the General Order under the Solicitors' Remuneration Act, 1881, Rule 7, a solicitor is entitled to interest at 4 per cent. on his costs from one month from demand from the client, which has been held to mean from the date of sending in the bill: *Ante*, p. 409. *Blair v. Cordner* (1); and where, as in this case, the costs are payable out of a fund not presently available, such demand may be made on the trustees who represent the fund and hold it for the benefit of all the beneficiaries.

And if the solicitor, who is not a party to the action, has this right against the fund in the hands of the trustee, the client must have the same right, as otherwise the last clause of Rule 7 would be useless; and, moreover, the beneficiaries are in the meantime receiving 4 per cent. on their shares in the fund. If Rule 7 does not *per se* give the right, then I rely upon the general right to interest given by 1 & 2 Vict., c. 110, ss. 17, 18, under which interest at 4 per cent. is recoverable on costs which one party is ordered to pay to another; and if it be contended that this provision applies only to party and party costs, then, I submit, Rule 7 was intended to supplement the provision so that interest should be payable in all cases not covered by ss. 17 and 18.

(1) 19 Q. B. D. 516.

H. Warlters Horne, contra :—

Chitty, J.
1889.

Interest is not recoverable on costs payable out of a fund : *Attorney-General v. Nethercote* (1), except there has been a special direction under 23 & 24 Vict., c. 127, s. 27, for payment of the amount of costs as taxed with interest at 4 per cent. from the date of the certificate.

Rule 7 of the General Order under the Solicitors' Remuneration Act, 1881, has no application to costs in an action, whether payable out of a fund or between party and party, but is limited to non-contentious business; the power to make General Orders for prescribing and regulating the remuneration of solicitors being expressly limited by Section 2 of the Act to business connected with sales, &c., and other matters of conveyancing, and "other business not being business in any action, or transacted in any Court or in the Chambers of any Judge or Master, and not being otherwise contentious business."

Blair v. Cordner (2) only decides that sending in a bill of costs *Ante*, p. 409. is equivalent to "demand from the client" under Rule 7. The application is, moreover, too late.

Macaskie, in reply :—

Section 2 and Rule 7 includes the right to conveyancing costs which are incurred in an action : *Stanford v. Roberts* (3); and *Ante*, p. 248. Section 5, which provides that any General Order under the Act may authorise the allowance of interest, is perfectly general, and does not limit the power to interest in non-contentious business. But if it be held that Rule 7 is limited, as contended by the other side, the plaintiff ought to be allowed now to show that a considerable portion of these costs were in respect of conveyancing business in connection with the appointment of new trustees.

CHITTY, J. :—

Since the matter was before me in Chambers the only evidence produced was the orders of the 29th of July, 1885, and the 12th of April, 1886. It was stated on behalf of the trustees that they had divided the funds according to the order; that statement was accepted, and I decided, as my Chief Clerk had considered, that

(1) 11 Sim. 529.

(2) 19 Q. B. D. 516.

(3) 26 Ch. D. 155.

Chitty, J.
1889.

the application was too late. But, as a fact, there was an affidavit in existence which was not drawn to my attention. Nothing is adjourned to me unless it is ready for decision, as I will not have adjournments from time to time for fresh evidence. The affidavit was not tendered, and no leave has been given to alter the case made before my Chief Clerk, and read a new affidavit, and, indeed, it would require a very strong case to induce me to give such leave after the matter has been gone into before me. Consequently that affidavit cannot now be used.

Upon the main question I am of opinion that the solicitors have no right to interest. Under 1 & 2 Vict., c. 110, ss. 17, 18, costs carried interest not from the date of the judgment, but from the date of the Taxing Master's certificate. Then come the Rules under the Judicature Act of 1883, Order XLI., Rule 3, and Order XLII., Rule 16, the effect of which, combined with 1 & 2 Vict., c. 110, ss. 17, 18, in the case of an ordinary action where costs are ordered to be paid adversely, is to give solicitors the right to interest from the date of the judgment. But it is plain that the sections of the Judgment Act and the Orders have no reference to the payment of costs directed to be paid out of a fund. Without relying on *Attorney-General v. Nethercote* (1), decided in January, 1841, this has been the constant practice; and where the fund is in the hands of the Paymaster-General, he is not at liberty to make any payment of interest unless there is a direction to that effect in the order. In that case the order is for taxation and payment of the costs by the trustees out of a particular fund, and there is no ground for saying that anything more than the amount of the taxed costs should be paid. If any interest was to be paid by the trustees the order ought to have directed it. In special circumstances such a direction might have been given, but the order is silent in that respect. Thus far, therefore, the solicitors are not entitled to interest. But then it is suggested that they are entitled to interest by reason of the Solicitors' Remuneration Act, 1881, General Order, Rule 7. Now, on reading Rule 7, I should say that it does not apply to such a case as this.

The fund is in the hands of trustees who are directed by the order on further consideration to pay the taxed costs, and then to

(1) 11 Sim. 529.

divide the fund. The rule shows that there must be demand and default, and if there has been a demand and default, -and interest is payable out of the fund, the result would be that the beneficiaries who are entitled to the balance of the fund would be mulcted by the trustees, though if any persons are liable it would be the trustees, who are personally liable. A higher point has been taken, that the power to make orders under the Act of 1881 is limited to non-contentious business, and so that the rule does not apply to the costs in an action. But, then, without any evidence to that effect, it is suggested that some part of these costs are conveyancing costs. They are not costs in respect of conveyancing done within the scope and meaning of the Act; they have been taxed and paid, and I cannot listen to the ingenious suggestion which has been made, and send the matter back in order to ascertain whether some part of these costs were conveyancing costs or not, so as to allow interest upon items which may thus be picked out. Such a course would not be in accordance with the order of the Court directing execution of the trust and division of the fund after payment of the costs; and if there were any ground for the contention, it should have been put forward at the time of making the order. And, further, to refer the matter back to the Taxing Master now, would be keeping back the distribution of the fund. The result, therefore, is that there is no right to interest in this case. Whether interest on a portion of the costs might or might not be allowed is a matter of doubt, but it is now too late to raise the question and attempt to sever the costs.

The trustees have partially divided the fund, and if I order them to pay interest out of funds not divided, injustice would be done, because in that case the trustees would not be paying it out of the whole fund. The application fails therefore on principle.

Solicitors: *Nicholson & Graham*, for *Withington*, *Petty & Boutflower*, Manchester; *Pollock & Co.*

Chitty, J.
1889.

Jan. 30.

In re READE'S TRUSTS;
SALTHOUSE *v.* READE.

(By permission, from 33 S. J. 219.)

Solicitors' Remuneration Act, 1881—General Order, Schedule II.—Documents—Drawing, &c.—Attendances—Special Condition of Sale in respect of unsold Lot—Deducing Title.

THIS was a summons to review taxation. The question was, whether the introductory words of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881, "Instructions for drawing and perusing deeds, wills, and other documents," included particulars of sale.

CHITTY, J., said that it had already been held that "documents" under these rules was not to be taken in the largest sense of the word, but to be taken in connection with the context: *Parker v. Ante, p. 483. Blenkhorn and Newbould v. Bailward* (1). For his part, reading these introductory words with the context, he should hold that documents did include particulars of sale, and that in ordinary cases 2s. a folio was chargeable for drawing such particulars. He thought that the Taxing Master in such a case had a discretion, and that the words, "in extraordinary cases the Taxing Master may increase or diminish the above charge," was not confined to "attendances," but included the drawing of documents and other items mentioned in Schedule II.

A second question was whether commission was chargeable under Rule 2 of Schedule I., Part I., in respect of a subsequent private sale of a lot which was unsuccessfully put up for sale at public auction, but which the solicitor claimed to have "negotiated."

CHITTY, J., said that the question was one of fact whether there was an actual negotiation and arrangement of terms of sale within Rule 2. The facts appeared to be that, ten months after the attempted sale by auction, an intended purchaser walked into the solicitor's office, and all that the solicitor had to do was to submit to his client the purchaser's offer. The vendors were trustees, who

could not sell without leave of the Court, and according to the terms and conditions which had already been settled for the auction. The Taxing Master had rightly refused to allow the commission under Rule 2, for the solicitor had done no new business or arranged the price and conditions. If there, in fact, had been any negotiation, whether to a large or to a small extent, he could not have disallowed the commission.

Chitty, J.
1889.

A third question then arose whether the scale fee for deducing title included remuneration for the preparation of special conditions of sale in respect of a lot which was not sold. The Taxing Master was of opinion that it did not, and had allowed extra remuneration for work done in respect of this special condition on the old system. This allowance was objected to.

CHITTY, J., said that the question was whether the solicitor had been already remunerated for the work done in respect of the unsold lot. If the lot had been sold, he would have got his percentage in respect of the price of the lot. As the lot was not sold, he was not entitled to such percentage. The work to which the scale fees applied was deducing title to the lots which were sold. The solicitor had done no special work which was not within the scale fee, and was entitled to be remunerated for it under the old system.

Counsel: *Romer, Q.C., & Shebbeare; Bardswell.*

Solicitors: *Walker & Field.*

North, J.
1889.

In re MONTAGU, SCOTT & BAKER.

Feb. 19.

(*By permission*, from W. N., 1889, 40.)

Solicitor—Costs—Taxation—Agreement with Client as to Remuneration—Solicitors' Remuneration Act, 1881, s. 8.

SUMMONS by solicitors to review a taxation of costs. The business to which the bill of costs related was the transfer of a mortgage to a new mortgagee. The solicitors had charged in their bill the scale fee for “negotiating” the mortgage, in accordance with the Solicitors’ Remuneration Order of August, 1882, and also a sum of £40, which they described as an agreed bonus at the rate of 2 per cent. for procuring the loan. The Taxing Master disallowed the £40, on the ground that there was no sufficient evidence of an agreement in writing between the client and the solicitors as required by sect. 8 of the Act. The Master also said that he thought the bonus was an unfair charge. On the hearing of the present summons it was admitted that the solicitors were not entitled to both the bonus and the “negotiating” fee.

J. G. Butcher, for the solicitors.

Cozens-Hardy, Q.C., and *Hatfield Greene*, for the client.

NORTH, J., affirmed the decision of the Taxing Master. He was of opinion that the alleged agreement was not within the Act at all. The Act contemplated an agreement for the payment of a lump sum or a commission in lieu of the solicitor’s remuneration, whereas the agreement alleged here was for a payment in addition to his remuneration; and, if there was an agreement within the Act, the charge of commission in addition to the solicitors’ ordinary charges was unfair.

Solicitors: *Montagu, Scott & Baker; V. J. Chamberlain.*

In re BRAY ELECTRIC TRAMWAY.*M. R.*
1889.*(By permission, from 23 L. R. Ir. 116.)*

Feb. 25.

Solicitor and Client—Costs—Attendances, Evidence of—1 & 2 Geo. IV., c. 53, s. 49—4 Geo. IV., c. 61, s. 19.

On taxation, as between solicitor and client, it is not necessary that the solicitor should prove attendances on his client by contemporaneous entries in his books, provided that he give other satisfactory evidence thereof.

SUMMONS to review taxation.

The Bray Electric Tramway was an undertaking under the Tramways and Public Companies (Ireland) Act, 1883, Messrs. Killingley & Shanks being the promoters thereof. They employed Messrs. Hamilton & Craig as their solicitors in obtaining an Order in Council, under the said Act, for constructing the tramway. They furnished their bill of costs, pursuant to a requisition, dated the 22nd August, 1888, and it was taxed under the rules regulating the taxation of costs in the Chancery Division on the higher scale. Amongst the items disallowed by the Taxing Master was item 12, claiming costs for attendance on the promoters at Foster-place, Dublin, the place of business of Mr. Shanks, in response to a letter of his, dated the 9th November, 1886, with a copy of a draft notice settled by counsel when they approved of the same. The Taxing Master in his certificate stated that he disallowed this item because no book was produced before him containing the entry or record of this attendance, specially having regard to 1 & 2 Geo. IV., c. 53, s. 49; that Mr. Craig supported the claim by an affidavit, but that a proper current entry or record should be produced when required to sustain such an item; and he also referred to 4 Geo. IV., c. 61, s. 19.

Mr. Eiffe, in support of the summons:—

The statutes referred to do not require the proof demanded by the Taxing Master. It cannot be the law that a solicitor is to get no costs of attendances if he omits to make an entry thereof in his book.

[Counsel cited *Maw v. Pearson* (1).]

(1) 3 N. R. 99.

M. R.
1889.

Mr. Gaussen, contra :—

This was a matter within the discretion of the Taxing Master, with which this Court will not interfere.

[Counsel cited *Thomas v. Mannix* (1); *Hughes v. Guinness* (2).]

The MASTER OF THE ROLLS :—

This is a question on which I have no doubt. It is not a matter for the discretion of the Taxing Officer. If it were so—if it were a question as to the propriety or necessity of this attendance, or even as to whether it had in fact taken place or not, I should be slow to interfere with his decision without very plain grounds. But there is no such question here. Mr. Craig's affidavit proves that he did in fact go to meet his clients, and the clients' letter is produced, requesting him to do so. The Taxing Master puts his decision on a very narrow ground. He states it as a simple proposition of law that he "would not be warranted" in allowing this item in the absence of entries; and he refers to certain statutes, which, however, contain nothing requiring contemporaneous or any entries or records of such attendances to be made.

No doubt it is a wholesome practice to hold a solicitor to strict proof, and it would be only proper for him to make such entries, and the Taxing Master might disallow the expenses of the affidavit necessary to make up for the absence of an entry. But there is no such rule as he lays down. As Mr. Craig's affidavit gave sufficient proof, I must allow this item.

Solicitors for the applicants: *Messrs. Hamilton & Craig.*

Solicitor for Messrs. Killingley & Shanks: *Mr. E. Harris.*

(1) 3 Ir. C. L. R. 128.

(2) 4 Ir. C. L. R. 314.

In re STEWART.

Kay, J.
1889.

(By permission, from 41 Ch. D. 494; s. c. 37 W. R. 484.)

March 18,
23.

Solicitor—Bill of Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), s. 7—General Order under the Act, rr. 2, 6, Schedule I., Part I., r. 11—Business completed before Order came into operation—Pending Business—Notice of Election—"Undertaking any business"—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18), s. 82 (Revised Ed. Statutes, vol. ix., p. 647)—Purchasers' Costs under that Act—Conveyance—Grant of Easement over Land.

The General Order under the Solicitors' Remuneration Act, 1881, is, by virtue of Section 7 of the Act, applicable to business completed before the Order came into operation.

The expression, "undertaking any business," in Rule 6 of the Order, means not merely accepting the retainer, but rather entering upon the work—that is, doing something for which the solicitor is entitled to make a charge, whether such charge is or is not covered by the scale fee under the Order.

Solicitors were employed by a Corporation in purchases of property for a waterworks scheme effected under statutory powers. The employment commenced before, and continued after, the date when the General Order under the Solicitors' Remuneration Act, 1881, came into operation. After that date the solicitors gave the Corporation notice, under Rule 6 of the Order, that they elected to charge for the business done after the commencement of the Act according to the old system as altered by Schedule II. to the Order. The solicitors delivered bills of costs relating (1) to business completed before the Order came into operation; (2) to business pending when the Order came into operation, in which work was done after the Order came into operation and before the notice of election was given, and (3) to business so pending in which no work was done after the Order came into operation until after the notice of election was given:

Held, (1), that as to the completed business the Order applied, and the taxation must be according to the scale in Schedule I.;

(2), that as to the pending business in which work was done before notice of election, whether or not of a kind covered by the scale fee, the notice was ineffectual, and the taxation must therefore be according to the scale;

(3), that as to any separate matters of conveyancing in which no work was done until after the notice of election, the notice, according to the decision in *In re Love* (40 Ch. D. 637), was effectual, and the taxation must therefore be according to the old system as altered by Schedule II. *Ante*, p. 511.

Quære, whether where work is done by solicitors under one and the same retainer it is competent for them, by delivering separate bills of costs for various branches of the work, to exclude the operation of the Order as to some of such bills.

The exception contained in Rule 11 of Schedule I., Part I., of the General Order, whereby in the case of sales under the Lands Clauses

Kay, J.
1889.

Act the scale is rendered inapplicable, extends only to vendor's costs and not to the costs of the purchasers. Grants by way of sale of rights and easements of laying and maintaining pipes in land are not "conveyances of property" within Schedule I., Part I., and consequently the scale is not applicable to solicitors' charges in respect of such grants.

ADJOURNED SUMMONS to review taxation.

The applicants, Messrs. W. H. & M. Stewart, were employed by the Corporation of Wakefield as their solicitors in carrying out work in connection with a waterworks scheme under the Wakefield Corporation Waterworks Act, 1880. The Act incorporated the provisions of the Lands Clauses Consolidation Act, 1845, and empowered the Corporation to take lands compulsorily.

In the course of their employment the applicants acted in giving notices to treat in respect of land and property required by the Corporation, in settling claims for compensation by arbitration and otherwise, and in investigating titles and conveying property.

The General Order under the Solicitors' Remuneration Act, 1881, having come into operation on the 1st of January, 1883, the applicant, W. H. Stewart, on the 10th of May, 1883 (with the view of giving notice of election pursuant to Rule 6 of the Order), addressed to the Corporation a letter as follows:—

"Wakefield Corporation Waterworks.

"In accordance with the provisions of the Solicitors' Remuneration Act, 1881, I desire to inform the Corporation that I elect to make my charges against them for the business done in connection with the new waterworks undertaking after the commencement of the Act according to the old system of making out solicitors' charges as altered by Schedule II. to the Order made in pursuance of the Act."

The applicants delivered to the Corporation fifty-nine bills of costs in respect of the business done by them, for sums amounting in the aggregate to £3,204 14s. 8d. Some of these bills had reference exclusively to each of the following classes of business: (1) business which was completed before the 1st of January, 1883, when the General Order came into operation; (2) business pending on the 31st of December, 1882, in which work to which the *ad valorem* scale in Schedule I., Part I. to the Order was applicable,

Kay, J.
1882.

had been done since that date and before the 10th of May, 1883, when the notice of election was given; (3) business so pending in which work to which the scale was not applicable had been done during the same period; (4) business so pending in which no work was done during the same period, but which business was continued after the 10th of May, 1883; (5) business done in respect of purchases of land taken by the Corporation under the provisions of the Lands Clauses Consolidation Act, 1845; (6) business done in respect of purchases by and grants to the Corporation of rights or easements of laying and maintaining lines of pipes through and over lands not so taken, which rights or easements were acquired by the Corporation under their statutory powers. By the grants in question no land whatever was conveyed, but merely the right of laying and maintaining pipes through or over land, and of entering upon the land from time to time for such purposes. The purchase money was in each case a small sum of money—*e.g.*, £5 or £10.

On the 14th of October, 1886, an order was made for the taxation of the bills, and on the 16th of February, 1888, the Taxing Master made his certificate settling the bills at the sum of £2,440.

In respect to the business comprised in the classes numbered above, 1, 2, and 3, the Taxing Master had taxed the bills according to the scale in Schedule I., Part I., to the General Order. In respect to the business comprised in Class 5, he had taxed the bills as if they did not come within the exception of "sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser," contained in the 11th Rule of Schedule I., Part I. In respect to the business comprised in Class 6, he had treated the grants above mentioned as being conveyances to which Rule 2, sub-rule (a), and the scale in Schedule I., Part I. of the General Order were applicable.

The applicants carried in various objections to the taxation, and the Taxing Master, in answer to such objections, stated his reasons for so taxing the bills. The grounds of objection taken and the reasons of the Taxing Master, so far as material, sufficiently appear from the arguments and judgment.

This was a summons by the applicants asking that, their

Kay J.
1889.

objections to the taxation might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly.

Sir H. Davey, Q.C., and Swinfen Eady, for the applicants:—

As to the business completed before the General Order under the Solicitors' Remuneration Act came into operation, the taxation ought to be according to the old system. The Order does not apply to such business. The mode of a solicitors' remuneration must be determined according to the time when he undertakes the business. The Order is to take effect from and after the date therein named—that is, it is to regulate the remuneration of solicitors for all work to which it is applicable, done from and after that date. By Rule 6 of the Order the solicitor has a right to elect that his remuneration shall be according to the existing system as altered by Schedule II., but he is to make his election “before undertaking any business,” and therefore, if the Order applied to business previously done, it would be impossible for the solicitor to make any election as to such business, and he would be placed in a worse position as to work already completed than as to work commenced subsequently. Moreover, upon this construction of the Order, the effect of it would be to alter *ex post facto* the contract between the solicitor and his client, under which the solicitor was entitled to be remunerated according to the existing law. It cannot be supposed that the Order was intended to have

Ante, p. 278.

such a retrospective operation. *In re Field* (1) has no application on this part of the case, because there the decision was only as to business pending when the Order came into operation. There are, no doubt, observations of the learned Judges tending to show that the Order is applicable to business already completed (see in particular, Lord Justice Fry) (2), but they are mere *dicta*, not necessary for the decision of the case. Even if the Order applies, it does not follow that the scale is applicable, for taxations according to the old system (subject to the variations in Schedule II.) are regulated by the General Order no less than those which are subject to the scale; see the decisions in the House of Lords in

Ante, p. 286.

Ante, p. 483.

Newbould v. Bailward and *Parker v. Blenkhorn* (3), reversing

(1) 29 Ch. D. 608.

(2) 29 Ch. D. 616.

(3) 14 App. Cas. . 1

decisions of the Court of Appeal in *In re Newbould* (1) and *In re Parker* (2). *Kay, J.*
1889.

As to business pending when the Order came into operation, in which work to which the scale is applicable was done before the 10th of May, 1883, when the notice of election was given, it must be admitted that the decision in *In re Field* (3) applies, and that the notice of election was therefore too late; but, as to the other pending business, it is submitted that the notice of election was effectual, and that the taxation ought to be according to the old system as altered by Schedule II. Rule 6 of the Order only applies where the solicitor, after the Order came into operation, undertakes any business to which the scale would be applicable in the absence of election to the contrary. The solicitor has complied with the requirement of that rule if he makes his election at any time before he has set his hand to work to which the scale is applicable. The decided cases are consistent with this view: see *In re Allen* (4), *Hester v. Hester* (5), where Lord Justice Lindley (6) intimated that the business was undertaken when the solicitor "first did any work covered by the scale-fee," and *In re Love* (7), which is expressly in point. *Ante*, p. 278.
Ante, p. 348.
Ante, p. 360.
Ante, p. 511.

As to all work done for the Corporation as purchaser under the Lands Clauses Act, the scale is clearly not applicable because the case comes within the exception contained in the concluding part of Rule 2 of Sched. I., Part I., of the Order, providing that "in case of sales" under that Act "or any private or public Act under which the vendor's charges are paid by the purchaser," the scale shall not apply. The words are perfectly general, and apply as much to the costs of the public body purchasing as to the costs of the vendor. It is true that the reference is to "sales" only, and not to purchases, but there cannot be a sale without a purchase. There are good reasons for the exception; for the purchasers may, as is often done, restrict the costs by not requiring so long a title, or such full evidence of title as they would insist on if the vendor had to bear his own costs. Moreover, railway companies have to go through very expensive proceedings for the

(1) 20 Q. B. D. 204.

(2) 59 L. T. N. S., 491; W. N., 1888, p. 108.

(3) 29 Ch. D. 608.

(4) 34 Ch. D. 433.

(5) *Ibid.* 607.

(6) *Ibid.* 617.

(7) 40 Ch. D. 637.

Kay, J.
1889.

purpose of purchasing small strips of land, and the costs necessarily incurred are out of all proportion to the purchase money, so that the *ad valorem* scale would be unjust to solicitors. The words referring to other Acts of Parliament are merely descriptive of Acts of a similar purport to the Lands Clauses Act. The Taxing Master has said that the Lands Clauses Act does not affect purchaser's costs. But this is inaccurate, inasmuch as sect. 82 of that Act refers to the costs "as well of the seller as of the purchaser."

The purchases by the Corporation of the easement or right of laying pipes are not business within sub-rule (a.) of rule 2 of the General Order, but fall within sub-rule (c), and the grants of such easements are not conveyances within the meaning of Sched. I., Part I., so that the *ad valorem* scale is not applicable, but the taxation ought to be according to the old system as altered by Sched. II. No land was conveyed by these grants, which were merely in the nature of licenses to the Corporation to lay and maintain pipes over the land of others. The purchase moneys were small sums, but the work might extend to a difficult investigation of the title of the grantor, and be as great as if the land itself were conveyed. Therefore the *ad valorem* scale would be a peculiarly inappropriate mode of payment. The Taxing Master has relied on the definition of "conveyance" in Section 2 of the Conveyancing Act, but that definition is only for the purposes of that Act, and it is not permissible to construe one Act of Parliament by a definition clause contained in another. Moreover, the definition goes a great deal too far for the purpose, as it includes every assurance of every interest in land.

Renshaw, Q.C., and R. F. Norton, for the Corporation:—

The Taxing Master was right in holding that the *ad valorem* scale was applicable. As to the completed business, the words of Section 7 of the Solicitors' Remuneration Act are express: "As long as any General Order under the Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby." This provision extends to every taxation of costs which takes place after the Order comes into operation. The time at which the remuneration of the solicitor is fixed is the date of the order to

tax. At any time after the Act was passed solicitors could obtain an order to tax, and, if they did, the taxation would be on the old system. The General Order was issued in August, and published in September, 1882, and it did not come into operation until the 1st of January, 1883; no injustice, therefore, was done to solicitors who had this interval of time in which to obtain an order to tax if they desired to be remunerated according to the old system.

Kay, J.
1889.

As to the pending business, the Taxing Master rightly held that the notice of election was ineffectual. The business is "undertaken" within the meaning of Rule 6 of the Order the moment the solicitor does any work for which he can make a charge, whether that charge be covered by the scale fee or not, and as to pending business he must elect before he does anything which it is necessary to do in the course of carrying out the business which he has already undertaken: *Hester v. Hester* (1). *In re Love* (2) *Ante*, p. 360. the question before Mr. Justice Stirling was as to separate matters *Ante*, p. 511. of conveyancing, in which no work was done until after the notice of election was given, and that decision is only applicable to that extent.

The exception in Rule 11 of Sched. I., Part I., to the General Order has no application to the purchasers' costs under the Lands Clauses Act. Sect. 82 of that Act provides only for the costs of the vendor, and not for the costs of the purchasers, who are the promoters of the undertaking, and, of course, have to pay their own costs. The section deals with the question of costs as between vendor and purchaser, not as between solicitor and client. The words "as well of the seller as of the purchaser" were inserted in the section because, as the law then stood, a purchaser often incurred costs which he had a right to recover over from the vendor. In the earlier part of Rule 11 reference is made to negotiating in case of sales or purchases, while in the later part, containing the exception, sales only are mentioned, so that the distinction between sales and purchases is clearly indicated. The object of the exception was to prevent any implied repeal of the Lands Clauses Act as to vendors' costs, and the words referring to other Acts "in which the vendor's charges are paid by the purchaser" show plainly that the intention was to

(1) 34 Ch. D. 607, 614.

(2) 40 Ch. D. 637.

Kay, J.
1889.

limit the operation of the exception to vendor's costs. There can be no injustice to the solicitor in applying the *ad valorem* scale; because he can protect himself by electing under Rule 6 of the General Order.

The grants of easements are clearly conveyances of property within the meaning of Sched. I., Part I. The Solicitors' Remuneration Act and the Conveyancing Act were passed in the same year, and form one scheme of legislation, and the Taxing Master was justified in referring to the definition clause in the Conveyancing Act. An easement or right of laying pipes in land is a right or interest in land, and is clearly property.

[KAY, J.:—There was merely a licence to do certain acts.]

It is property just as much as an exclusive right of fishing in gross or an exclusive right of common. The General Order in Rule 2, Sub-rule (c), specially provides for mining licenses and takes them out of Sub-rule (a), and as there is no exception of other licenses they must be included. For the reason already given, there can be no injustice to the solicitor.

Swinfen Eady, in reply.

KAY, J.:—

March 23.

The Corporation of Wakefield under a special Act which incorporated the general Acts and empowered them to take lands compulsorily, have been engaged in establishing waterworks. In this business they have employed the present applicants as their solicitors. Such employment commenced before the passing of the Solicitors' Remuneration Act, 1881, and continued after that Act, and the rules made under it, came into operation.

In respect of the work so done voluminous bills of costs have been delivered, and by an order of the 14th of October, 1886, these costs were referred to taxation. The taxation has been completed, and the solicitors have carried in various objections.

The first and most important of these relates to work which was completed before the 1st of January, 1883, when the General Order under the Solicitors' Remuneration Act came into operation. The bills of costs numbered 9, 17, 24, 27, and 29 are, it is said, bills concerning conveyancing business which was altogether com-

Kay. J.
1889.

pleted before that date, and was not business which was pending in any sense at the time when the Order came into operation. The 7th section of the Act is in these words: "As long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby."

It is argued that, whenever the work was done, if the taxation takes place after the General Order came into operation, such taxation must be regulated by the General Order, and that consequently if the work is such that the scale charge fixed by the Order would apply, if it had been done after that date, it must apply by the terms of the Act, although the work had been completed previously. On the other hand, it is contended that to such work the General Order does not apply at all. If it did, the solicitor would lose the power of electing given to him by the 6th clause of the General Order altogether, and he would thus be in a worse position as to work completed before that date, when there was no such Order in operation at all, than as to work commenced subsequently, with respect to which he would be able to elect whether the scale fee should apply or not. It is admitted that if it be work to which the General Order applies, the 7th section of the Act is express and imperative as to the regulation of the taxation, but it is urged that the work in question was done under a different law, and the contract between client and solicitor could not be intended to be altered by an Order *ex post facto*.

These are excellent and cogent reasons for saying that sect. 7 of the Act should not have been in its present form or that the General Order should have made an exception in the case of conveyancing work completed before it came into operation and taxed afterwards; or again, if the enactment were ambiguous, they would be reasons for giving the applicants the benefit of any doubt upon its construction.

Sect. 7 is express and clear; it admits of no doubt; it is not at all ambiguous. Any taxation after the General Order comes into operation is to be regulated thereby. It is impossible to deny that this includes the taxation, after that date, of costs incurred before.

The Act received the royal assent on the 22nd of August, 1881.

Kay, J.
1889.

The operation of the General Order was purposely delayed till after the 31st of December, 1882, though it seems the Order was issued in August, and published in September, 1882. This delay must have been intended to give an opportunity to any one who desired it to tax costs under the old rule before the Order began to operate. If the applicants did not choose to avail themselves of this, there is no injustice in now subjecting them to the operation of the General Order, as sect. 7 of the Act says shall be the case.

Another view of the matter, which is of some importance, is that all this work was done under one and the same retainer, and this delivery of separate bills, and the attempt to say that some of such bills do not come within the Act and Order, is scarcely a legitimate mode of increasing costs against the Corporation. If all the work done under this retainer were included in one bill of costs in order of date, it would be hardly possible to argue that a line should be drawn on the 31st of December, 1882, and everything before that date should be taxed under the old system, but everything since should be taxed under the General Order. Yet that in effect is what the applicants are trying to do. Only they seek to make their case more plausible by delivering separate bills of costs for various branches of the work done, and then attempting to say the General Order does not apply to some of the bills so made out.

On the 10th of May, 1883, the solicitors gave to the Corporation notice of their desire to elect under the General Order in the following terms. [His Lordship read the letter of that date above set out, and continued] :—This notice is quite general, and refers to all business, pending as well as future. As to pending business, there was, I am told—(1) business pending on the 31st of December, 1882, in which work had been done since that date and before the date of the notice, which work would be covered by the scale-fee; (2) also some in which work had been done which would not be covered by the scale-fee, but would be allowed for separately; and (3) business pending in which nothing was done between the 31st of December, 1882, and the date of the notice, but such business was continued after the notice.

As to (1), it is admitted that the notice to elect was too late.

As to (2), it is argued that there was no “undertaking the

Kay, J.
1889.

business" between the 31st of December, 1882, and the notice; because, although work was done in the particular matter for which the solicitor could and did charge, it was not work covered by the scale-fee. I disagree with this argument. The doing of that work was certainly "undertaking the business," whether it was covered by the scale-fee or not; and, in my opinion, the solicitor, if this had been work under a retainer accepted after the order came into operation, would be too late in attempting to elect after he had undertaken the business by doing anything in it for which he could make a charge.

The words of clause 6 of the General Order are that "a solicitor may, before undertaking any business," elect. It is not "before undertaking that he will do," or "before undertaking to do," any business. "Undertaking any business" I understand to mean not merely accepting the retainer, but rather entering upon the work, *i.e.*, doing something in the matter for which he would be entitled to make a charge; but if he does anything for which he is entitled to charge, it seems to me impossible to say that he has not undertaken the business, whether that charge is covered by the scale-fee or not.

With respect to business pending on the 31st of December, 1882, and completed afterwards, I confess it seems to me that the true view of the Order is that clause 6, giving the solicitor power to elect, does not apply at all, because in no true sense can business which was commenced before, be said to be undertaken after that date. The solicitor, of course, could protect himself by declining to go on with the business unless his client would agree to remunerate him in some other way. Such agreement would have to be in writing under sect. 8 of the Act of 1881. However, I have been referred to a case of *In re Love*, which is not yet reported (1), in which Mr. Justice Stirling, following some *dicta* in *In re Field* (2), has held that clause 6 is to be read as if the words "subsequently to this Act coming into operation" were inserted before the words "before undertaking any business." Following that decision, I must hold that, where nothing was done in pending business between the 31st of December, 1882, and the 10th of May, 1883, the notice to elect was effectual.

(1) Since reported, 40 Ch. D. 637.

(2) 29 Ch. D. 608.

Kay, J.
1889.

Two other questions remain. One is whether the scale applies at all to work done for a purchaser in case of a purchase under the Lands Clauses Consolidation Act. The doubt arises under the 11th of the rules in Sched. I., Part I., of the General Order, which contains this provision: "In case of sales under the Lands Clauses Consolidation Act or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply." Sched. I. is referred to in the 2nd clause of the General Order, in which sales and purchases are separately mentioned, and it is provided that in respect of sales and purchases, the remuneration of the solicitor having the conduct of the business, whether for the vendor or purchaser, is to be that prescribed in Part I. of Sched. I., and to be subject to the regulations therein contained. Sched. I. provides one scale for the vendor's solicitor, and another and different one for the purchaser's solicitor. The early part of Rule 11 refers to negotiating in case of a "sale or purchase," but the words which I have quoted from that rule, which are at the end of it, refer only to the case of "sales" under the Lands Clauses Act. Looking to the 82nd section of that Act, I have no doubt that the reference to sales only is intentional, and I think the reason is apparent. That section provides in effect that, where lands are taken compulsorily, the vendor's costs shall be borne by the purchasing company, and gives a liberal allowance of such costs, which it is the obvious purpose of this Rule 11 not to interfere with. But no such reason exists for excepting the purchaser's costs, in the case of land compulsorily taken, from the operation of this Order for a scale charge, and consequently the latter part of Rule 2 seems to be limited, designedly and with reason, to the vendor's costs in case of a sale under compulsory powers.

The last point relates to the costs of the purchase and grant of the right or easement of laying and maintaining the lines of pipes through the lands of other persons, which the Corporation obtained under the powers of their special Act. In these cases no land whatever was conveyed, and the consideration seems to have been in each case a small sum of money, £5 or £10, or the like. The question is whether the scale charge in Schedule I., Part I., of the

Kay, J.
1889.

General Order applies to such a case. Clause 2 of the General Order simply speaks of sales and purchases without saying of what. But Schedule I., Part I., provides a scale for negotiating for the purchase of "property," and for investigating title to "freehold, copyhold, or leasehold property," and preparing and completing conveyance. Can the grant of an easement like this be considered a conveyance of freehold, copyhold, or leasehold property, within the meaning of that schedule? I confess it seems to me difficult so to hold.

Obviously the schedule contemplates *primâ facie* conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase money which is paid when such property changes hands. When a mere easement is granted there is no change of property in that sense, and the purchase money is comparatively trifling in amount; but it might well be that a difficult and expensive investigation of the grantor's title might in many cases be necessary for which a scale charge, calculated on the purchase money of the easement, would be a very inadequate compensation. It is true that the solicitor might protect himself by electing under Clause 6, but I have referred to these considerations as reasons for showing that the scale was not intended to be applicable to the mere grant of an easement, to which, according to their true construction, the words of the Order do not apply.

The result is, that I agree with the Taxing Master, except only that I must hold the notice to elect effectual as to all separate matters of conveyancing in which nothing was done between the 31st of December, 1882, and the 10th of May, 1883, but which were completed after the latter date; and that the purchases of licenses to lay pipes are not within the General Order as to a scale charge.

The costs must follow the result, and must be set off in the usual way.

The matter was accordingly referred back to the Taxing Master, with an expression of his Lordship's opinion to the above effect.

Solicitors: *Torr, Janeways, Gribble & Oddie*, agents for *Stewart, Son & Chalker*, Wakefield; *Sharpe, Parkers, Pritchard & Sharpe*, agents for *C. J. Hudson*, Town Clerk, Wakefield.

C. A.
1889.

In re MARTIN (A LUNATIC).

April 9, 16.

(By permission, from 41 Ch. D. 381; s. c. 33 S. J. 398, W. N. 1889, 84.)

Solicitor—Costs—Taxation—Solicitors' Remuneration Act, 1881, s. 2—Business connected with Lease—Abortive Negotiations—General Order under Solicitors' Remuneration Act, 1881, Rule 2 (b), (c), Schedule I., Part II.

The remuneration of a lessor's solicitor prescribed in the General Order under the Solicitors' Remuneration Act, 1881, Schedule I, Part II., does not cover negotiations carried on by the solicitor as to the letting of the property with persons other than the person to whom the lease is ultimately granted. The solicitor is entitled to remuneration for such negotiations as business "which is not in fact completed" under Rule 2 (c) of the same General Order.

Ante, p. 278.

Ante, p. 332.

In re Field (29 Ch. D. 608) and *In re Emanuel & Simmonds* (33 Ch. D. 40) distinguished.

MR. G. W. BARNARD was employed by the committee of a lunatic to act as his solicitor in reference to the letting of a house which formed part of the lunatic's estate.

On the 8th of December, 1887, the committee put up in the window of the house a notice containing the words "To Let," and directing application to be made by persons desirous of taking the house to Mr. Barnard for information and particulars. In consequence of this notice several persons applied to Mr. Barnard, and he or his clerks showed them over the house and wrote letters to the applicants, and from time to time reported to the committee the applications and the replies to the letters. In November, 1887, before the house became vacant, an offer to take the house had been made by Mr. Parkes to the solicitor, and when it became vacant the solicitor informed Mr. Parkes of the terms and particulars, and Mr. Parkes renewed his offer, which was accepted by the committee on the 19th of January, 1889. On the 6th of March an order was made in the lunacy directing that the house should be demised to Mr. Parkes on the terms contained in a draft lease which had been prepared by the solicitor, and that the reasonable and proper costs, charges, and expenses of the committee of, incident to, and consequent upon the proceedings, should be taxed and paid by the committee out of the lunatic's estate, after deducting the taxed costs of the lease and counterpart, which the lessee had

agreed to pay. The lease was accordingly granted to Mr. Parkes, who paid the scale fees to the lessor's solicitor as prescribed by the General Order under the Solicitors' Remuneration Act. The solicitor then carried in his bill of costs against the lunatic's estate for taxation. The bill included items for negotiations with Parkes, and also items for negotiations with other persons. The Taxing Master disallowed all the charges other than the sum paid as the scale-charge by Schedule I., Part II. The solicitor acquiesced in the disallowance as to the negotiations with Parkes, having regard to *In re Field* (1) and *In re Emanuel & Simmonds* (2); but carried *Ante*, p. 278. in objections to disallowance of the charges for negotiations with *Ante*, p. 332. other persons.

The Taxing Master overruled the objections, and gave his reasons for doing so as follows:—

“The committee objects that I have disallowed certain items, which he contends are not covered by the scale-charge because his solicitor considers that, although the scale-charge covers the negotiations with the person who ultimately became tenant, he is entitled to charge for negotiations with, and attendances on, all other persons. In the well-known cases of *In re Field* and *In re Emanuel & Simmonds*, it was decided that negotiations and an agreement pre-*Ante*, p. 278. liminary to the lease were covered by the scale-charge, because *Ante*, p. 332. they were ‘business connected with the lease.’ In those particular cases the question as to negotiating with other persons than the actual person who became tenant did not arise, but the Taxing Masters have considered that, according to the decisions in those cases, the scale-charge covers all business connected with the particular letting, and that all negotiations which lead to the granting a lease are part of such business. The question does not depend on the meaning of the word ‘negotiating,’ but on whether or not the work in question is ‘connected with the lease.’ The question raised more or less affects the construction of the scale fees for negotiations expressly given by the General Order. That is, a vendor's solicitor for negotiating a sale; a purchaser's solicitor for negotiating a purchase; a mortgagee's solicitor for negotiating a loan. No separate fee for negotiating is provided for a lessor, lessee, or mortgagor's solicitor, but is included in one general *ad*

C. A.
1889.

valorem fee for the whole business connected with the lease or mortgage. If the contention of the objectant in this case is valid, it would seem to follow that the negotiating fees expressly provided would not cover negotiations with any persons other than the one who actually sells or buys, or finds the money for a mortgage, and that negotiations with any other person are not connected with the sale, purchase, or mortgage. It would, it is submitted, be inconsistent with the principle of a commission that a solicitor should be entitled to charge in detail for negotiations with several persons, and then a commission for, it may be, one attendance on the one accepted. In the case of the estate agent paid by commission on letting a house, the commission, of course, covers the whole of the negotiations. It would be scarcely possible, in many cases, to ascertain which of the charges made lead up to the actual letting, and which do not; in fact, all must do so more or less. The acceptance or not of the offer of A. depends upon what offers may have been made by other persons."

The solicitor then presented a petition in the lunacy for a review of the taxation.

Sir Horace Davey, Q.C., and F. A. Archibald, for the petitioner:

With respect to the negotiations with Parkes which led to the granting of the lease, we admit that they are covered by *In re Field* (1) and *In re Emanuel & Simmonds* (2), and we do not insist on our objection on that point, but those cases only apply to negotiations leading up to the lease which is eventually signed. Here Mr. Barnard had been negotiating with other persons, and the negotiations had become abortive and were concluded before the lease was executed. Therefore the case falls within Rule 2 (c), not within Rule 2 (b). The negotiations were going on for several weeks, and it would be unjust that the solicitor should not be paid for them. Supposing the whole matter had become abortive and no lease at all granted, there is no question that he would have been entitled to remuneration under Rule 2 (c) for all negotiations. So that, if the Taxing Master is right, it would lead to this absurd result, that if the solicitor failed in finding a lessee he would be paid for all his trouble, but if he succeeded in eventually

Ante, p. 278.
Ante, p. 332.

finding a lessee, he would get no remuneration for anything beyond the preparation and execution of the lease. *Newbould v. Bailward* (1), recently decided by the House of Lords, is in our *Ante*, p. 483. *C. A.*
1889.

COTTON, L.J. :—

This is a petition presented by Mr. Barnard, a solicitor, to review the taxation of the Master to whom his bill of costs has been referred.

It appears that he was employed by the committee of the estate to see to the letting of a house, No. 7, York Road, Lambeth, which was part of the property of the lunatic, and a portion of the duty which he performed was getting possession of this house from the previous tenant, who was not a satisfactory one, and those costs have been taxed. Mr. Parkes, who ultimately obtained a lease of the premises, made an application in the first instance to Mr. Barnard, and between his application and the time when the lease was granted various applications were made by different persons with whom Mr. Barnard, the petitioner, acted more or less in negotiating as to whether or not a lease should be granted to them. Of course, Mr. Barnard was entitled to be paid according to the scale of charges. The Taxing Master has taxed his bill under that scale, but he has disallowed all charges made in Mr. Barnard's bill for negotiations preceding the granting of the lease, including all negotiations with the other persons who from time to time applied to him as to this house. Objection to that has been taken, and the result is that this petition has been presented against the Taxing Master's certificate.

Mr. Barnard, in the first instance, objected to all the disallowances of the previous negotiations which had been made by the Taxing Master, but when the case came before us, Sir Horace Davey, who appeared for the Petitioner, did not press the objection to the disallowance of the charges for the negotiations with Mr. Parkes, and that was in accordance with two decisions of this Court, which cannot be called in question here. These cases are *In re Field* (2) and *In re Emanuel & Simmonds* (3). But there *Ante*, p. 278. may have been negotiations with other persons which were not *Ante*, p. 332.

(1) 29 Ch. D. 608.

(2) 33 Ch. D. 40.

(3) 14 App. Cas. 1.

C. A.
1889.

questioned by those cases, and Sir Horace Davey pressed us to review the Master's taxation in that respect.

On this matter we must refer to the Orders and the schedules of the Orders which now regulate a solicitor's remuneration, and the scale of charges which applies to sales, conveyances, and leases. The schedule as to leases, as in Part II., stands in a different position from the charges and the Orders as regards sales. As regards leases, the scale of charges is for leasing or for agreements for leases at rack-rents. Then, where the rent does not exceed so much, it gives so much to the lessor's solicitor "for preparing, settling, and completing the lease and counterpart." Now, if there was that alone, we should not have decided as we did in the two cases that I have referred to. But then we have been referred to the 2nd rule of the General Order, which says: "Subject to the exception aforesaid, the remuneration of a solicitor in respect of business, connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master, is to be regulated as follows." That is, the scale-fee to be his charge in respect of business connected with sales, &c. In the cases to which I have referred the leases had been granted to the persons with whom the negotiations originally took place. There the matters were all connected with the granting of the lease. The schedule to which I have referred only mentions the particular lease which is to be prepared by the solicitor, and which is to be charged for by him, and where, having regard to the 2nd rule, all matters which are really connected with the preparation of the lease or agreement for a lease (that is, where there is only to be an agreement for a lease) are clearly within the words of the 2nd rule. Of course, in some cases it may be hard, and in other cases it will be for the benefit of the solicitor, and will give him more than he would have been able to get if there had been no scale.

But then there is a direction as to the thing done where the business is not completed; and, in my opinion, where there are negotiations for a lease, which have entirely concluded without having produced any lease at all, the solicitor must get his claim

allowed under the direction of business which is not completed. I think it would be wrong, if there was a negotiation entirely at an end before the fresh negotiation had begun with the person to whom the lease was granted, that there should be no claim for the business done in respect of the completed negotiation which led to no lease, and therefore which did not come in any way within the schedule to which I have referred. It would be wrong to extend the cases of *In re Field* (1) and *In re Emanuel & Simmonds* (2) to a case like this, where there were negotiations with persons who were intending to be but who were not lessees, and who were persons to whom no lease was granted. If we extended these cases to these negotiations the solicitor would get no payment at all for the trouble and business he had undertaken between the parties. Of course it would be a question for the Taxing Master to consider what allowance ought to be made to a solicitor for the work involved in these negotiations which led to nothing, but in my opinion, here the Taxing Master was wrong in laying down this rule so fully, that as regards the claim for negotiations with persons other than Mr. Parkes, he is entitled to disregard them, and not to enter into question of whether any sum is properly payable in respect of those negotiations.

Ante, p. 278.*Ante*, p. 332.

As regards the negotiations with Mr. Parkes, those would be all business connected with the lease which was actually granted, and in respect of which the solicitor would be paid his charges, which would include all business connected with that matter; but but as regards the other negotiations, all of which in this case were between the first application of Mr. Parkes and the granting of the lease, I think we ought to send the matter back to the Taxing Master to review his taxation, and to consider what is properly payable to the solicitor, treating these negotiations as being negotiations with other persons which did not lead to any lease at all. As regards the business actually connected with the lease which was executed, that is covered by the scale-charge. We are of opinion that the matter ought to go back to the Master in order to reconsider what remuneration ought to be allowed to the solicitor.

(1) 29 Ch. D. 608.

(2) 33 Ch. D. 40.

C. A.
1889.

LINDLEY, L.J. :—

This question turns upon the true construction of the rules under the Solicitors' Remuneration Act, 1881, and especially rule 2, sub-sect. (b), and Schedule I., Part II., which have all to be read together, and the question which we have to consider is whether the work for which Mr. Barnard now asks that he may receive compensation in addition to the scale-charge is or is not covered by the scale-charge when construed by the rules to which I have referred.

Now it appears to me that when we understand rule 2, sub-sect. (b), and Schedule I., Part II., the result is that this particular work for which he seeks to be remunerated is not covered by the scale of charges. If it were, the amount of the scale of charges is all that he could recover.

I need add nothing to what the Lord Justice has said, except perhaps this, that it appears to me that this decision is consistent with *In re Field* (1), and it is more in accordance with the principle on which the House of Lords acted in *Newbould v. Bailward* (2) than the opposite conclusion would be.

Ante, p. 278.

Ante, p. 483.

It seems to me, therefore, that Mr. Barnard is entitled to these charges, subject of course to taxation.

Solicitor: *G. W. Barnard.*

(1) 29 Ch. D. 608.

(2) 14 App. Cas. 1.

WESTON v. STEEDS.

Q. B. Div.
1889.

(Before HARRISON, O'BRIEN, MURPHY, and HOLMES, JJ.)

June 3.

(1882, N. No. 232.)

(By permission, from 24 L. R. Ir. 283.)

Practice—Taxation of Costs—Witnesses' expenses.

In an action for breach of warranty of a horse sold to the plaintiff, who resided in England, the plaintiff produced, as witnesses at the trial, three English veterinary surgeons, who had examined the horse shortly after the purchase, and deposed to its unsoundness. The plaintiff recovered a verdict, and the Taxing Master having, on taxation, disallowed the expenses of two of these witnesses, the Judge at the trial considering them necessary witnesses :—

Held, that their expenses should be allowed.

APPLICATION, on summons for an order that the plaintiff's costs herein to be referred back to the Taxing Officer, with directions to him to allow the plaintiff the items Nos. 172, 173, and 174, being the amounts of witnesses' expenses paid to Messrs. Cox, South, and Dring by the plaintiff, or such other amount as may be just and reasonable, having due regard to the amounts paid and the fact that the attendance of said witnesses could not be otherwise secured, and for the costs of the application.

The material facts were as follows :—

The action was for damages for breach of warranty of a certain horse sold by the defendant to the plaintiff under the following circumstances :—

The plaintiff resided near Weymouth, in England, and the defendant at Clonsilla, in the county of Dublin. The alleged warranty was contained in a letter from defendant to plaintiff, dated the 4th August, 1888, and on the faith of which, it was alleged, the plaintiff bought the horses for the sum of £250.

The plaintiff's groom came from England to Dublin, and saw the horse, which was examined and passed by a veterinary surgeon in Dublin as sound, and was then taken to England, and paid for by plaintiff by cheque upon the 23rd August, 1888.

A few days afterwards the horse showed signs of unsoundness,

Q. B. Div.
1889.

and was, upon the 23rd August, 1888, examined by the witness Dring, who certified to the unsoundness; and thereupon, after certain correspondence between the parties, the plaintiff had the horse examined by Messrs. Cox and South, two eminent veterinary surgeons of London, who also certified to the unsoundness of the horse, and the horse was then sent back to the defendant on the 6th September, 1888, who acknowledged its arrival but declined to accept it as returned on account of unsoundness. On arrival in Dublin the horse was examined by three local veterinary surgeons on behalf of the plaintiff, who were examined at the trial.

Certain negotiations for a settlement between the parties ensued, but were unsuccessful, and the case came on for trial before Mr. Justice Holmes.

The attendance at the trial of Messrs. Cox, South and Dring was directed by plaintiff's senior counsel, and under his direction an application to this division was made for *subpœnas ad test.* to secure their attendance, but same were refused until plaintiff failed to secure their attendance by previous payment of their expenses, &c. This course was adopted, and the witnesses attended at the trial, and were examined for the plaintiff, and cross-examined for the defendant. During the trial all the professional witnesses both for plaintiff and defendant examined the horse (either at the suggestion or with the concurrence of the presiding Judge), and all these witnesses afterwards deposed that the horse was undoubtedly unsound then. The jury found for the plaintiff for £60 damages and costs, for which judgment was duly entered.

On the ground that Messrs. Cox and South were unnecessary witnesses, and that Mr. Dring's expenses were overcharged, the Taxing Officer made the following deductions from the plaintiff's bill of costs furnished for taxation:—

Item.	Amount charged.			Amount deducted.		
	£	s.	d.	£	s.	d.
172. J. R. Cox, Expenses, . . .	47	10	0	47	10	0
173. W. A. South, do., . . .	47	5	0	47	5	0
174. C. J. Dring, do., . . .	31	10	0	13	18	0

From this taxation the present appeal was taken.

J. Gordon, for the plaintiff :—

Q. B. Div.
1889.

The plaintiff was unable to secure the attendance of these witnesses otherwise than by paying what was the least they would come to Ireland for, viz., the amounts paid; and therefore the plaintiff is entitled to charge accordingly: *Carson v. McCullagh* (1), *Little v. Gore* (2). Undoubtedly the witnesses were material and necessary. When they had examined the horse shortly after the sale, and to the knowledge of the defendant, it would have been hopeless to proceed to trial without their evidence. The Taxing Officer had no right to disallow items 172 and 173; and as to item 174, there may be doubt about that item.

[Counsel also referred to Ord. X., Rule 8, of the Rules of April, 1878; *Loneragan v. Royal Insurance Company* (3), *Robb v. Ante*, p. 135. *Connor* (4).]

D. B. Sullivan, contra :—

The Officer is the judge as to the proper number of witnesses to prove each fact. It is a matter for the discretion of the Taxing Officer, and the Court will not let their opinion prevail against that discretion: *Thomas v. Mannix* (5). These witnesses, Messrs. South and Dring, were unnecessary, and the Officer considered them so. They could give no evidence as to the soundness of the horse at the date of the sale, as they did not see it till the 5th September, nearly three weeks after the sale. As to Mr. Dring's expenses, the Officer has allowed him what was proper, and the Court certainly should not interfere.

[Counsel also referred to *Blyth v. Fanshawe* (6).]

HARRISON, J. :—

We direct that the bill of costs in this case be referred back to taxation, with a direction to the Officer that he should allow the expenses of the two witnesses, Messrs. Cox and South. We express no opinion as to the expenses of the witness Mr. Dring; he stands in a different position, the Taxing Officer having

(1) 12 L. R. Ir. 117.

(2) Batty's Rep. 144.

(3) 1 Dowl. Pr. Cas. 223.

(4) Ir. Rep. 9 Eq. 373.

(5) Ir. R. 3 C. L. 128.

(6) 10 Q. B. Div. 207.

Q. B. Div.
1889.

allowed portion of his expenses, and with the taxation of that item we shall not interfere.

As to the actual amount which the Officer is to allow Messrs. Cox and South, we at present express no opinion. The plaintiff by his present summons asks that "the amounts actually paid to these two witnesses should be allowed, or such other amounts as may be just and reasonable, having regard to the amount paid, and the fact that the attendance of said witnesses could not be otherwise secured." We shall not make our order in that form; but during the argument sufficient intimation was given by the Court to show that we consider the principle in the summons thus stated to be the proper one. In our opinion the Taxing Officer erred in the principle of his taxation. [His Lordship then refers to the facts of the action, as stated *supra*, p. 283].

Ante, p. 554.

The learned Judge, who presided at the trial of the action (Mr. Justice Holmes), states that he considers it would have been almost hopeless for the plaintiff to go to trial without the evidence of these two witnesses (Cox and South).

We direct that the bill be referred for re-taxation, holding that these were necessary witnesses under the circumstances of the action, and that the Taxing Officer allow for their expenses whatever is the proper amount.

O'BRIEN, MURPHY, and HOLMES, JJ., concurred.

Order accordingly.

Solicitors for the plaintiff: *Casey & Clay.*

Solicitors for the defendant: *D. & T. Fitzgerald.*

IN THE GOODS OF MARY HAYDEN.

(Before WARREN, J.)

Prob. Div.
1889.

Oct. 28.

(*By permission, from 23 Ir. L. T. 566.*)

Practice—Costs—“Costs of trial,” what constitutes.

THIS suit has been brought to set aside the will of Mary Hayden, who died in the County Kilkenny about 25 years ago, leaving assets estimated at £17,000. Some of this money had been paid away to a blacksmith named John Hayden. The plaintiff is the inmate of a Roman Catholic Convent in Brooklyn, and the question now at issue was whether Ellen Lannon was the lawful niece and nearest of kin to testatrix. Certain issues in the case had been tried, and had been decided in the plaintiff's favour. A new trial had been granted on the terms of Martin Lannon paying the costs of the first trial, except the costs attendant on the first of the issues. Master Mathews had taxed the costs on the principle that the “costs of trial” included only counsel's fees, witnesses' expenses, solicitor's attendance and fees, and the costs of the notice of trial, which ruling it was now sought to have reviewed.

Bewley, Q.C., & Hunt, for the plaintiff.

Walker, Q.C., & Matheson, for the intervenient.

WARREN, J., upheld Master Mathews' ruling, with the addition that in his (Judge Warren's) opinion the plaintiff was also entitled as regards the costs of the trial to two-thirds of the shorthand writer's notes, amounting to about £10, the costs of the motion to be borne by the parties.

Ex. Div.
1889.

Nov. 8.

Appeal.
1890.

Feb. 19, 20,
27.

MYERS v. PHELAN AND OTHERS.

(Before PALLES, C.B., DOWSE, B., and ANDREWS, J.)

(*By permission*, from 26 L. R. Ir. 218; s. c. 24 Ir. L. T. R. 60).

Practice—Costs—16 & 17 Vict. c. 113, s. 78—19 & 20 Vict c. 102, s. 97.

In an action in which there were three counts, each in tort, and the parties resided within the jurisdiction of the Civil Bill Court of the county in which the causes of action had arisen, the jury found a verdict for the plaintiff for £2 damages on two counts, and that £5, which had been lodged in Court by the defendant, on foot of the third count, was sufficient —

Held, by the Court of Appeal (Lord Ashbourne, C., O'Brien, C.J., and FitzGibbon, L.J.; *diss.* Porter, M.R., and Barry, L.J.), reversing the decision of the Exchequer Division, who felt themselves bound to follow *Arkins v. Armstrong* (Ir. R. 3 C. L. 373), that the plaintiff was not entitled to any costs of the action.

Arkins v. Armstrong (Ir. R. 3 C. L. 373) overruled.

ADJOURNED SUMMONS to review taxation.

The action was brought to recover damages for trespasses committed by the defendants upon certain premises situate in Clonmel, and also for an injunction.

The plaintiff filed his statment of claim whereby he pleaded—

1. That the defendants on divers occasions broke and entered his lands situate near a laneway, known as the laneway to Tom O'Brien's house in Clonmel.

2. That they on divers occasions broke, injured, and utterly destroyed divers carts and barrows of the plaintiff.

3. That they broke and entered upon certain walls, windows, bars, railings, gates, and posts standing on the plaintiff's lands.

4. That they wrongfully obstructed the plaintiff in a certain right of way to which he was entitled.

5. That the defendants wrongfully obstructed a certain highway, whereby the plaintiff was prevented from using same, and from carrying on his trade as a farmer.

The defendants, by their statement of defence, traversed all

the acts complained of in the claim ; and also, by way of further defence to the 1st and 3rd paragraphs, pleaded (paragraph 5) that the plaintiff theretofore in the County Court of the County of Tipperary, holden at Clonmel, then being a Court duly constituted and holden under the statutes relating to the County Court, and then having jurisdiction in respect of the causes of action in the said paragraphs mentioned, duly issued a process for the same causes of action respectively as in the said paragraphs mentioned ; and such proceedings were thereupon duly had in the said Court in the matter of the said process ; that afterwards, by the said judgment of the said Court duly made, it was ordered and decreed that the plaintiff's said process should be dismissed on the merits with costs, and the said judgment was still in full force : judgment dated the 16th March, 1887 ; and (paragraph 8) by way of alternative defence to the 2nd paragraph thereof the defendants pleaded as follows :—" Lest contrary to what they believe or contend, they are under any liability to the plaintiff in respect of the said cause of action they bring into Court the sum of £5 and say that the said sum of £5 is sufficient to satisfy the plaintiff's claim in respect of the said causes of action " (1).

The plaintiff replied, joining issue.

The action was tried before Mr. Justice Johnson and a jury of the South Riding of the County of Tipperary, at the Clonmel Summer Assizes, 1888. The jury found as follows :—

1. That the defendants committed the acts in the 1st and 3rd paragraphs of the statement of claim mentioned ; and also that the process in the 5th paragraph of the defence mentioned was not for the same causes of action as in the 1st and 3rd paragraphs of the statement of claim mentioned.

2. That the defendants committed the acts in the 2nd paragraph of the statement of claim mentioned.

3. That the defendants did not commit the acts in the 4th paragraph of the statement of claim mentioned.

(1) The defendants also pleaded, by way of counter-claim, to which the plaintiff replied, traversing the allegations, and lodging 5s. in Court. The money was subsequently accepted by the defendants in full satisfaction, and no order was made by the Judge on foot of the counter-claim.—*REP.*

Ex. Div.
1889.

4. By direction—that there was no public highway as in the 5th paragraph of the statement of claim mentioned.

Post, p. 562.

The jury assessed the damages in respect of the causes of action mentioned in the said 1st and 3rd paragraphs at the sum of £2; and found that the sum of £5 lodged in Court by the defendants as in the 8th paragraph of the defence mentioned was sufficient to satisfy the plaintiff's claim in respect of the causes of action set forth in the 2nd paragraph of the statement of claim. The judgment, as amended (1), was entered for the plaintiff for £2 damages, with legal costs (if any) in respect of the causes of action in the said 1st and 3rd paragraphs; and for the defendants with costs in respect of all the other causes of action in the said statement of claim and the defences thereto. His Lordship refused to certify that the case was a fit one for the superior Courts. The plaintiff then lodged his costs for taxation; and the Taxing Officer (Master Davis) proceeded to tax the same, and allow several items.

The defendants thereupon objected to all the items allowed by Master Davis on (amongst others) the following grounds:—

1. That, inasmuch as the plaintiff recovered only £2 damages, in respect of the causes of action set forth in the 1st and 3rd paragraphs of the statement of claim, and both parties resided in the same civil bill jurisdiction, he was not entitled to any costs.

2. That the causes of action set forth in the 2nd paragraph of the statement of claim were separate and distinct from the causes of action in the 1st and 3rd paragraphs thereof, and that separate judgments had been entered in respect thereof, and that the Taxing Master should have treated them as if they were separate and distinct actions.

3. That the jury found that the £5 lodged in Court was sufficient to answer the plaintiff's claim in the said 2nd paragraph, and that on such finding judgment had been entered for the defendant in respect of said causes of action, and the said sum of £5 remained in Court to answer the defendant's costs, pursuant to Section 76 of the Common Law Procedure Act, 1853. The Taxing Master allowed the defendant's said objections. The plaintiff

then objected to the ruling of the Taxing Master on (amongst others) the following grounds :—

Ex. Div.
1889.

1. That the plaintiff was entitled to the general costs of the action, having recovered £7.

2. That the plaintiff had recovered £5 lodged in Court under the 8th paragraph of the defence.

3. That the said 76th Section had no application to the case.

The Taxing Master overruled the plaintiff's said objections and disallowed the plaintiff's costs of action, and allowed the defendant his general costs of action. The plaintiff then applied to the Judge in Chambers for an order to review the said taxation, and to allow the plaintiff his general costs of action. The summons having duly come on for hearing was adjourned for hearing before the Divisional Court.

Matheson (with him *Sergeant Hemphill, Q.C.*), for the plaintiff :

The plaintiff is entitled to the general costs of the action. By Section 97 of the Common Law Procedure Act, 1856, it is provided that in an action of tort, where the parties reside within the same civil bill division, if the plaintiff shall recover damages not exceeding £5, he shall not be entitled to any costs. But in this case he recovered in all £7. In an action in contract, containing two counts, where the plaintiff recovered £8 on foot of one count, and the jury found that £12 lodged in Court on foot of another count was sufficient, the plaintiff was held entitled to full costs, although both parties resided in the same civil bill division, notwithstanding the 243rd Section of the Common Law Procedure Act, 1853, and the 97th Section of the Act of 1856: *Arkins v. Armstrong* (1). In an action in contract, where the defendant lodged £16 in Court, which sum the plaintiff drew out, and the plaintiff then proceeded to trial and recovered £6 over and above the £16 lodged in Court, it was held that the two sums of £16 and £6 should be added together, so as to entitle the plaintiff under the 243rd Section of the Act of 1853 to the full costs of the action: *Hughes v. Guinness* (2). *Palmer v. Garrett* (3) is to the same effect.

Ante, p. 74.

[Counsel also cited *Leonard v. Brownrigg* (4), and Section 76 of *Ante*, p. 82. the Common Law Procedure Act of 1853.]

(1) *Ir. R.* 3 C. L. 373.

(3) *Ir. R.* 5 C. L. 412.

(2) 4 *Ir. C. L. R.* 314

(4) *Ir. R.* 6 C. L. 161.

Ex. Div.
1889.

Carson, Q.C. (with him *Cherry*), for the defendants:—

The plaintiff is not entitled to any costs. The two counts deal with distinct causes of action, and the finding of the jury that the £5 lodged in Court was sufficient was a verdict for the defendant on that count: Common Law Procedure Act, 1853, Section 78. The identical question arose in *Walsh v. Walsh* (1), where the defendant lodged £5 in Court on foot of one count, which sum the plaintiff drew out in full satisfaction, and the jury found for the plaintiff £1 on another count in tort, and the Court held that the plaintiff was not entitled to costs. The £5 was not “recovered” in the action.

[*Devine v. London and North Western Railway Co.* (2) and *Blackmore v. Higgs* (3) were also referred to.]

The Exchequer Division held that they were bound to follow the authority of *Arkins v. Armstrong* (4).

The following is the curial part of their Lordships’ order:—

“It is ordered by the Court that the said Taxing Master do review his taxation of costs in this action, and that he do allow to the plaintiff in the original action the general costs of the action in respect of the causes of action in the 1st and 3rd paragraphs of the statement of claim, without prejudice to the defendants’ right to costs upon the causes of action found for them.

“It is further ordered that the defendants do pay to the plaintiff the costs of this motion, when taxed and ascertained, and that the judgment marked in this action be amended by striking out the words following:—‘And the said Justice having ordered that judgment be entered for the plaintiff on foot of the said 1st and 3rd paragraphs with £2 damages, with costs if any, and for the defendants in respect of all the other causes of action, with costs of suit.’ And inserting in lieu thereof the words following:—‘And the said Justice, having ordered that judgment be entered for the plaintiff in respect of the causes of action in the said 1st and 3rd paragraphs, with £2 damages, with legal costs if any; and for the defendant, with costs, in respect of all other causes of action in the statement of claim and defence thereto:’ and by striking out of said judgment all the words after the words ‘It is adjudged,’ and inserting in lieu thereof the words following:—‘That the plaintiff do recover against the defendant in respect of the causes of action mentioned in the 1st and 3rd paragraphs of the statement of claim £2, and £—— for his costs, and that the defendants recover against the plaintiff £—— for his costs, in respect of all other causes of action in the statement of claim and the defences thereto.’”

(1) 17 Ir. C. L. R. 195.

(2) 17 Ir. C. L. R. 174.

(3) 15 C. B. N. S. 790.

(4) Ir. R. 3 C. L. 373.

The defendant appealed to the Court of Appeal (LORD ASHBOURNE, C., O'BRIEN, C.J., PORTER, M.R., and FRIZGIBBON and BARRY, L.JJ.)

Appeal.
1890.
Feb. 19, 20, 27

Carson, Q.C., & Cherry, for the appellant.

Sergeant Hemphill, Q.C., & Matheson, for the respondent.

The arguments below were substantially the same as those reported in the Court below, and the following additional authorities were referred to:—

Farmer v. Fottrell (1), *Wheeler v. United Telephone Company* (2), *Coughlan v. Morris* (3), *Berdan v. Greenwood* (4), *Fewster v. Boggett* (5), *O'Rorke v. M'Donnell* (6), *Cooch v. Maltby* (7), *James v. Vane* (8), *Dixon v. Walker* (9), *Beard v. Perry* (10), *Byrne v. M'Evoy* (11), *Ante*, p. 78. *Ryan v. Fraser* (12), *Hannan v. Laffan* (13), *Owens v. Vamhomrigh* *Ante*, p. 256. (14), *Richards v. Bluck* (15), *Boulding v. Tyler* (16), *O'Donnell v. Ante*, p. 218. *Callanan* (17), *Crosse v. Seaman* (18), *Hewitt v. Cory* (19), *Shrapnel v. Laing* (20), *Danby v. Lamb* (21), *Myers v. Defries* (22).

LORD ASHBOURNE, C.:—

This is an appeal from an order of the Exchequer Division, reversing a decision of the Taxing Officer (Master Davis), who considered that under Section 78 of the Common Law Procedure Act, 1853, the plaintiff was not entitled to the costs of the action. The case involves the consideration of arguments which have led to constant differences of judicial decisions, and as to which there have been many fluctuations of opinion. To use the words of Chief Justice Lefroy, in *O'Rorke v. M'Donnell* (23), "It is one of a

Feb. 27.

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| (1) 8 Ir. C. L. R. 228. | (13) 15 Ir. L. T. R. 32. |
| (2) 13 Q. B. Div. 597. | (14) 14 Ir. C. L. R. 362. |
| (3) 6 L. R. Ir. 405. | (15) 6 C. B. 443. |
| (4) 3 Ex. Div. 251. | (16) 3 B. & S. 472. |
| (5) 9 M. & W. 20. | (17) 20 L. R. Ir. 444. |
| (6) 13 Ir. C. L. R. App. 8. | (18) 11 C. B. 524. |
| (7) 23 L. J. Q. B. 305. | (19) L. R. 5 Q. B. 418. |
| (8) 29 L. J. Q. B. 169. | (20) 20 Q. B. Div. 334. |
| (9) 7 M. & W. 214. | (21) 11 C. B. N. S. 423. |
| (10) 31 L. J. Q. B. 80. | (22) 5 Ex. Div. 180. |
| (11) Ir. R. 5 C. L. 568. | (23) 13 Ir. C. L. R. App. 8. |
| (12) 16 L. R. Ir. 253. | |

Appeal.
1890.

class of cases upon which, not only the most eminent judges, but also the Courts themselves in England, have been divided in opinion, and in which the Court, now about to give judgment, is also divided in opinion."

The facts of the case may be stated in a few words. There were two counts in tort. As to one, the defendant lodged £5 in Court, which the jury found to be sufficient; as to the other, the jury returned a verdict for £2. Can the sums of £5 and £2 be added together for the purpose of entitling the plaintiff to his full costs of action under the provisions of the 97th Section of the Common Law Procedure Act, 1856? The Exchequer Division, constrained by a former decision of their own Division, when differently constituted—*i.e.*, the case of *Arkins v. Armstrong* (1), held that the sums could be so added together to give the plaintiff the costs of the action; but the Lord Chief Baron, who did not himself concur in the grounds of the decision of *Arkins v. Armstrong* (1), suggested that this appeal should be taken. Thus the case comes before us, and we have had the benefit of a full and clear argument, in which all the sections and cases have been examined.

Has the plaintiff any right to add the £5 which the jury has found to be sufficient to satisfy one count to the £2 which they have awarded on another count in tort, so as to get the costs of the action?

Take each count separately, and see how the case stands. The £5 is governed by Section 78 of the Common Law Procedure Act, 1853, which is in the following terms:—[His Lordship read the section]. The £2 is governed by Section 97 of the Common Law Procedure Act, 1856, and the Judge having refused to certify, the plaintiff is entitled to no costs. Therefore, it is manifest that, taking each count by itself, in one the defendant would be entitled to judgment and costs of suit, and in the other the plaintiff would be entitled to no costs whatever. But then comes the extraordinary contention of the plaintiff, that he is entitled to add the count where he would have to pay all the costs to the count where he would get no costs, and that the effect of this is to give him all the costs of the action. I am unable to assent to this contention, which would lead to some

(1) 17. R. 3 C. L. 373.

startling consequences. Supposing that a defendant had lodged £500 in Court on one count in tort, and that the jury found it was enough, and more than enough, and found one farthing damages on another count in tort, if the plaintiff is right in his contention, then the defendant would in vain have lodged his £500, and in vain would the jury have found in his favour. The plaintiff must get the whole costs, being permitted to add the farthing which, standing by itself, would give no costs to the £500 which, standing by itself, would compel the plaintiff to pay every farthing of the defendant's costs. Is the defendant to be in no better position than if he had paid in nothing? If Section 78 of the Common Law Procedure Act, 1853, does not govern the position, then no sane defendant should lodge money in Court, where there are other counts. For why should anyone pay money into Court when he can gain nothing by it? The remarks of Crowder, J., in *Smith v. Harnor* (1), are in point. There were two counts there in the declaration: the first for assault, on which the plaintiff obtained a verdict for £5, and the second for slander, in which the plaintiff failed. The defendant argued on Section 11 of the County Courts Act (13 & 14 Vict., c. 61) that the plaintiff, having only obtained a verdict for £5, without any certificate, should get no costs. The plaintiff said the section did not apply where there was another count, even where the plaintiff failed. Crowder, J., thus dealt with this curious argument: "See what absurdity that would lead to. If a plaintiff sues for slander, and fails, he pays costs; if he brings an action for an assault, and obtains no more than £5 damages, he gets no costs; but, according to your view, if he brought his action for the two, and altogether failed as to the one, and obtained less than £5 damages on the other, he would be entitled to the costs of the cause!" Very sensible words, which powerfully apply to the arguments addressed to us by the plaintiff in the present case.

All the authorities having been discussed and cited, I shall refer to some of them which strike me as the more important. The case of *Devine v. London and North Western Railway Company* (2) is important, although the Court was equally divided. The elaborate judgment of Mr. Justice Fitzgerald can be read with much

(1) 3 C. B. N. S. 829.

(2) 17 Ir. C. L. R. 174.

Appeal.
1890.

advantage. The facts are sufficiently stated in the marginal note and the eminent Judge I have referred to thus speaks of the application of Section 78 of the Common Law Procedure Act of 1853: "The defendant being thus entitled to judgment in the action of tort, the plaintiff contends that though in this action, so far as it is an action of contract, he has recovered a sum less than £20, he can call in aid the sum paid into Court in the action of tort in the other branch of the plaint; and that by adding together the two sums, so as to exceed £20, he becomes entitled to recover full costs. It seems to me that he cannot be permitted to do this. There are two actions here, one in contract and one in tort, disconnected with contract, and they are not the less to be considered two actions, separate and distinct in their two characters, because they are comprised in the same writ of summons and plaint. In the action of contract the plaintiff has recovered less than £20. On the other counts there is a verdict and judgment against him, and he is liable to the costs of suit on them; and it would be singular, indeed, if the plaintiff, being liable to the costs of suit in the action—so far as it is an action of tort—should be permitted to add the sum paid into Court on the counts in tort to the sum recovered in the action of contract, so as to entitle him to full costs of suit. I am of opinion that he has no such right, and that the ruling of the Taxing Officer was correct."

The case of *Walsh v. Walsh* (1) is strongly relied on by the defendant. The facts are thus stated in the marginal note. [His Lordship read the marginal note.] Chief Baron Pigot thus spoke of the acceptance of the money lodged by the plaintiff:—"The result of this appears to me to be that, upon the plaintiff's acceptance of the money, the cause of action in the second count was completely at an end, the demand upon it being satisfied, under the statute, by such acceptance; and the action was then no longer an action for the disturbance of a right of way, and for assault and battery but became, by the plaintiff's own act, an action solely for assault and battery against the defendant James Walsh; and as such, and as such only, was by the plaintiff prosecuted and brought to trial. And if that be so, the case is directly within the express terms of the 126th section of the

(1) 17 Ir. C. L. R. 195.

Common Law Procedure Act; for in this action for assault and battery the jury have found the damages under the value of forty shillings; and the Judge at the trial has not certified that the assault and battery were sufficiently proved." After referring to *Blackmore v. Higgs* (1), and the judgment of Chief Justice Erle, he proceeds thus:—"I apply that language to the case now before us to this extent, and to this extent only, that as Lord Chief Justice Erle and the rest of the Court treated the action in *Blackmore v. Higgs* (2), as in substance only an action for an assault upon the female plaintiff, because the event of the trial and the verdict of the jury showed that no other cause of action existed, so, in the present case, we ought to hold that this action was an action for assault and battery only, after the plaintiff had accepted the money lodged in Court in full satisfaction of his other demand for the disturbance of the right of way; because by his own act he had removed all question upon that other demand, and had prosecuted the action for no other purpose than that of recovering damages for the assault and battery." The clear and only meaning of that language is this, that where money is lodged in Court and drawn out by the plaintiff in full satisfaction, the action founded upon that is completely at an end, and the demand satisfied by such acceptance.

That is stronger than the present case, for here the plaintiff behaved more unreasonably. He did not accept the money lodged. He contested its sufficiency. It is absolutely impossible for the eminent Judge who pronounced the judgment in *Arkins v. Armstrong* (3), or any one else, to explain away his elaborate argument in *Walsh v. Walsh* (4). In the latter case he said that his decision in *Walsh v. Walsh* (5) rested on sect. 126 of the Common Law Procedure Act, 1853; but it must be remembered that *Walsh v. Walsh* (6) was only narrowed to that section by deciding that the £5 lodged in Court, and taken out in full satisfaction, must be deemed out of the action.

The case of *Palmer v. Garrett* (7) is interesting for the judgment of Chief Justice Monahan, which, however, founded itself

Ante, p. 74.

(1) 15 C. B. (N. S.) 790.

(2) 15 C. B. (N. S.) 790.

(3) Ir. R. 3 C. L. 373.

(4) 17 Ir. C. L. R. 195.

(5) 17 Ir. C. L. R. 195.

(6) 17 Ir. C. L. R. 195.

(7) Ir. R. 5 C. L. 412.

Appeal.
1890.

on *Arkins v. Armstrong* (1), and the narrow reading of the case of *Walsh v. Walsh* (2).

Ante, p. 82.

The facts of the case of *Leonard v. Brownrigg* (3) are different. There the plaint contained a count in contract and also a count in tort. The plaintiff cannot for the purpose of entitling himself to full costs add a sum paid into Court on foot of the count in contract (which, upon issue joined, the jury have found to be sufficient) to the damages awarded by the verdict on the count in tort. The judgment of Chief Justice Whiteside (at p. 170) may be read with advantage in this case. The case of *Arkins v. Armstrong* (4) has been referred to so often that I may assume its facts are fully present to the minds of all who are interested in this case. I satisfy myself with saying that it is entirely inconsistent with the judgment of the same Court in *Walsh v. Walsh* (5), and I do not concur in the reasoning on which the later judgment of the Lord Chief Baron proceeds.

Ante, p. 84.

I am aware of the differences of opinion which these cases have caused, and I have an unfeigned respect for the opinion of my colleagues on this Bench who differ from me, and but for the misgiving that may be caused by such knowledge, I must say that I never had less doubt in my life as to any decision I ever gave than that I now give for the defendant.

In my opinion the appeal should be allowed, with costs.

O'BRIEN, C.J. :—

The plaintiff being disentitled to costs in respect of the causes of action in the 1st and 3rd paragraphs of the statement of claim, by reason of the smallness of the amount (*viz.*, £2) he recovered, the question we have to decide is, whether the plaintiff, in order to get the general costs of the action, can add to the £2, which disentitle him to costs, the £5 paid into Court with reference to the 2nd paragraph of the statement of claim, and which £5 has defeated him and cast him in costs in reference to the matter to which it was pleaded. In other words, whether he can, on this question of costs, convert a defeat as to two causes of action, and

(1) *Ir. R.* 3 C. L. 373.

(2) 17 *Ir. C. L. R.* 195.

(3) *Ir. R.* 6 C. L. 161.

(4) *Ir. R.* 3 C. L. 373.

(5) 17 *Ir. C. L. R.* 195.

a complete rout as to costs as to another cause of action into a complete victory, so as to get the general costs of the action. This process of producing victory has been hitherto unknown in any species of contention, except that of law; and in law it has been unknown, except in the solitary case of *Arkins v. Armstrong* (1), decided in the Court of Exchequer in 1869, and which case I have no compunction in being a party to overruling; as I think, for reasons which I will assign, it is manifestly wrong. It is said *Arkins v. Armstrong* (2) was decided about twenty-one years ago, and that it is as it were hallowed by time; but we must remember there was no appeal from the decision in the then state of the law, and that the present Chief Baron (the head of the self-same Court of Exchequer) has plainly suggested this appeal because he thought *Arkins v. Armstrong* (3) wrongly decided. We have then the circumstance that there was no appeal at the time *Arkins v. Armstrong* (4) was decided; and we have the clear opinion of the head of the Exchequer Division that the decision of his own Court, now under review on this question of costs, is wrong. Under these circumstances I ask, if we believe it to be wrong, why should we hesitate to overrule it?

In my opinion the error (and error I believe it is) has not been rendered so sacrosanct by time or practice that we should proceed to stereotype it by our judgment. It appears to me it would be a very sorry conclusion, if we believed *Arkins v. Armstrong* (5) to be wrongly decided, to say to the Exchequer Division, when calling for help: "Time is against you; persist in your error."

I now come to the ground upon which I rest my judgment, and it is what I early thought governed the case—namely, the effect of the 78th Section of the Common Law Procedure Act of 1853. That section provides that in case the plaintiff declines to accept the sum paid into Court to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, the sufficiency of the payment shall be tried upon the issue raised for that purpose by the said defence; and, in case of such issue being found for the defendant, the defendant shall be *entitled to judgment and his costs of suit*.

(1) Ir. R. 3 C. L. 373.

(2) Ir. R. 3 C. L. 373.

(3) Ir. R. 3 C. L. 373.

(4) Ir. R. 3 C. L. 373.

(5) Ir. R. 3 C. L. 373.

Appeal.
1890.

And to what extent is he entitled to costs? He is entitled, as was decided in *Farmer v. Fottrell* (1) in case of a single cause of action, to his costs of suit, not merely from the lodgment of the money in Court, but from the very commencement of the suit. And the fact of the money being paid in as an alternative defence, if the plaintiff goes on to trial and is beaten on the issue as to its sufficiency, makes no difference as to the general result of the action and as to the general costs of suit, as was decided not only in one case, but in two cases, in the Court of Appeal in England—namely, in the case of *Goutard v. Carr* (2) and *Wheeler v. The United Telephone Company* (3). The Master of the Rolls (Sir W. Balfour Brett), in giving judgment in the latter case, said:—"In that case I express an opinion that, where payment into Court is allowed to be pleaded as an alternative defence it is a defence to the action, in the sense that if it succeeds the action is defeated." And later on he says:—"If it succeeds the result is the same as if, under the old system of pleading, the jury had found in favour of one plea which went to the whole cause of action." And Bowen, L.J., said in the same case, referring to the case of *Goutard v. Carr* (4):—"It is too late now to ask us to reconsider the case of *Goutard v. Carr* (5), but I may say that I have no doubt that it is correct. When such a defence as this is pleaded, and money is paid into Court, it was there decided that such payment shall be treated as a payment into Court according to what was prescribed by Order 30 of the Rules of 1875. If this were not so the defence would be incomprehensible, for why should anyone pay money into Court when he can gain nothing by it."

Now, that is the language of Lord Justice Bowen; but in this case what, according to the contention of the plaintiff, does the defendant gain? Merely the costs of an issue, whilst by the self-same defence of payment into Court he loses the action. At one and the same time the money found by the jury to be sufficient as to the cause of action to which it refers wins and loses for the defendant. It carries with it, according to the contention on behalf of the plaintiff, the trifling costs of the issue, but mulets him in the general costs of the action.

(1) 8 Ir. C. L. R. 228.

(2) 13 Q. B. Div. 598 n.

(3) *Ibid.* 597.

(4) 13 Q. B. Div. 598 n.

(5) 13 Q. B. Div. 598 n.

In my opinion the plea of payment of money into Court, if found by the jury for the defendant on the issue as to its sufficiency, has no such contradictory effect. The money found to be sufficient by the jury has a single consistent effect; in my opinion, it is only operative to give the defendant costs in reference to the matter to which it is pleaded, and can never be considered money recovered in the action, so as to have the contradictory and inconsistent effect of giving the plaintiff the general costs of suit.

The language of the 78th Section—"that the defendant shall be entitled to judgment and his costs of suit"—is, in my opinion, tantamount to an express declaration by the Legislature that when the money paid into Court produces, by the verdict of the jury, this result as to the cause of action to which it relates—namely, judgment and costs for the defendant, it can never be considered as money recovered by the plaintiff for the purpose of giving him costs.

Now I turn to *Arkins v. Armstrong* (1), and I read the passage which discloses the ground upon which the late Chief Baron rests his judgment. After observing upon the cases which were discussed here at the bar at such length, such as *Hughes v. Guinness* (2), *Fewster v. Boggett* (3), *Wallen v. Smith* (4), *Purr v. Lillicrap* (5), *Boulding v. Tyler* (6), *Robertson v. Sterne* (7), *Richards v. Bluck* (8), and others, he says:—"The authorities which I have cited, all giving a uniform meaning to the term 'recover,' would be directly applicable to the present case if the money had been paid into Court upon the same counts upon which the plaintiff recovered the £8. I see no difference in their application arising from the fact that the money was paid into Court on one count in an action of contract, while the 'recovery' of the additional sum was upon another."

This is the ground, the very point, of his decision. It is manifest that the learned Chief Baron entirely overlooked the effect of the verdict of the jury as to the sufficiency of the £12 paid into Court upon one of the counts, having regard to the 78th Section of the Common Law Procedure Act of 1853, with respect to that verdict. What analogy can there be between such cases as *Hughes v.*

(1) Ir. R. 3 C. L. 373.

(2) 4 Ir. C. L. R. 314.

(3) 9 M. & W. 20.

(4) 3 M. & W. 138.

(5) 1 H. & C. 615.

(6) 3 B. & S. 472.

(7) 13 C. B. N. S. 248.

(8) 6 C. B. 443.

Appral.
1890.

Guinness (1), in which the plaintiff won at the trial and had a judgment in his favour, in which the defendant was in default by not lodging enough, and in a case in which the plaintiff, as here, seeks to call in aid for the purpose of getting costs, a cause of action in reference to which he is beaten at the trial, in reference to which there is a verdict against him, and a judgment, not in his favour, but one against him—viz., that he should pay the defendant the costs of suit? Now, I say that I am confident that the late Lord Chief Baron overlooked the effect of the 78th Section of the Common Law Procedure Act of 1853. There is no reference to that section whatsoever in the report of the argument or of the judgment, and I am convinced from what I knew of that distinguished and accomplished Judge professionally, and from what it was my pleasing privilege to know of him personally, that if this 78th Section of the Common Law Procedure Act of 1853 was brought under his notice, or if he had his mind directed towards its effect, he would have dealt with it in the most exhaustive manner. It is too much to say that the effect of this section is so plain that it should be peremptorily dismissed as having no bearing upon the subject before us. My Lord Chancellor has founded his judgment on a consideration of that section. The Lord Chief Baron, I think, considers it conclusive of the matter. I believe Lord Justice Fitz-Gibbon mainly rests his judgment on a consideration of its effect. I say nothing of my own opinion; but when the three Judges I have named think this section has an intimate and I believe conclusive bearing on the case, is it to be said that the late Chief Baron, if it was present to his mind, would not have dealt with it? His judicial idiosyncrasy was to deal most exhaustively with any argument or consideration that was advanced or present to his mind. He did not deal with this section in *Arkins v. Armstrong* (2), and I am clear it was overlooked by him; but whether overlooked or not I think the decision wrong, and that it should be overruled. For my own part, I have had no difficulty as to the judgment I should give, and should now have no misgiving whatever as to its correctness, but that I know I differ from two members of this Court for whose opinion I have the very profoundest respect. However, having formed a very strong opinion as to the correctness of the conclusion

(1) 4 Ir. C. L. R. 314.

(2) Ir. R. 3 C. L. 373.

at which I have arrived, I concur, for the reasons I have given, in thinking that the judgment of the Exchequer Division should be reversed.

Appeal.
1890.

PORTER, M.R.:—

There are two principal points for our decision:—1. Is the £5 “recovered in the action?” If it is not, nothing more remains to be said:—2. If it be, is the plaintiff deprived of costs by the 78th Section of the Common Law Procedure Act, 1853?

That money paid into Court “is recovered in the action,” admits of no doubt: *Parr v. Lillicrap* (1). It is by force of the action that the plaintiff obtains it. The defendant was liable for it when the action commenced. He admits his liability by proceeding *in the action*. The money is lodged in Court “to the credit of the cause” (sect. 75), and can only be drawn out by the plaintiff on an application to the Master of the Court in the prescribed manner (sect. 76). Neither the 243rd sect. of the Act of 1853, nor the 97th sect. of the Act of 1856, nor any other section of either Act bearing on the point refers to the money as recovered *by judgment*, or *by verdict*, in the action. Apart from authority, therefore, the point is quite clear.

And the authorities are equally distinct on this question. Section 75 applies to “any personal action whatsoever,” with certain specified exceptions. Sections 243 (1853) and 97 (1856), include both “actions of contract” and actions for “wrong or injury, disconnected with contract,” save in specified excepted cases. Therefore decisions in actions of contract coming within those sections must apply, *mutatis mutandis*, to actions of tort coming within them—I mean actions of tort to which the sections apply: and, indeed, this was not for a moment questioned by Mr. Carson or Mr. Cherry, who argued the appeal. That, in relation to the present question, you can within these sections add money lodged in Court, in an action of contract, to money recovered by verdict or judgment, in the same action of contract, with a view to ascertain the amount recovered in the action, is shown, not alone by such cases as, in this country, *Hughes v. Guinness* (2), and *Palmer Auct.* p. 74.

(1) 1 H. & C. 615.

(2) 4 Ir. C. L. R. 314.

Appal.
1890.

v. *Garrett* (1), and in England, *Fewster v. Boggett* (2), and *Crosse v. Seaman* (3); but by the entire course of proceeding and practice in this country ever since the Act of 1853 became law. The caess establish that you can add money lodged in respect of one cause of action (in contract) to money lodged under another—so as out of two distinct causes of action (in contract) to recover £20 or upwards within the meaning of the sections—though less than £20 was lodged in one or recovered in the other. Cases such as *Leonard v. Brownrigg* (4) and *Devine v. London and North-Western Railway Co.* (5), in which it was held that you cannot add money lodged under a count in contract to money recovered by verdict upon a count in tort, do not touch this question; because granting that the same action might be an action in contract and an action in tort (within the meaning of the rule), if in such a mixed action you recover £19 by a lodgment in contract, and £4 by verdict in tort, were there no other reason for it, you do not recover £20 and upwards in an *action of contract*, nor more than £5 in an *action of tort*. Whether the distinction was a politic one is not the question. It is an obvious distinction on the words of the statutes, and it is the statutes that must decide this question.

Ante, p. 82.

On the point before us, it is admitted that *Arkins v. Armstrong* (6), though an action of contract, is, for present purposes if binding, a conclusive authority. I think it better, however, to postpone the consideration of that case for the present.

The only reported case in this country in which the point has been said to have arisen in an action of tort is *Walsh v. Walsh* (7), and there the Court of Exchequer, consisting of Pigot, C.B., Fitzgerald, Hughes, and Deasy, BB., held that where in an action of tort, £5 is lodged under one count, and accepted, and £1 recovered by verdict under another count, these sums could *not* be added together, so as to bring the amount recovered in the action above £5—a startling decision till it is understood, and one, if no different rule of law had intervened in it, diametrically opposed to *Hughes v. Guinness* (8), *Palmer v. Garrett* (9), and a whole course of decisions

Ante, p. 74.

(1) Ir. R. 5 C. L. 412.

(2) 9 M. & W. 20.

(3) 11 C. B. 524.

(4) Ir. R. 6 C. L. 161.

(5) 17 Ir. C. L. R. 174.

(6) Ir. R. 3 C. L. 373.

(7) 17 Ir. C. L. R. 195.

(8) 4 Ir. C. L. R. 314.

(9) Ir. R. 5 C. L. 412.

upon the same sections. But on examination it will be found that *Walsh v. Walsh* (1) does not at all conflict with these authorities, but is based exclusively on a section which does not and cannot touch them. I use the word "exclusively" advisedly, as applied to the decision, and I think I might use it (except for one single phrase, which, if correctly reported, is, I think, not law), with equal correctness, as applied to the reasons assigned by the Court. I refer, of course, to the expression of the Lord Chief Baron as to the cause of action being "struck out" of the declaration. The decision turned altogether upon Section 126 of the Act of 1853: "In all actions for a trespass on lands or tenements, assault and battery, or for slander, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40s., shall not recover or obtain more costs of suit than the damage so found shall amount unto, unless the Judge at the trial shall certify under his hand on the back of the abstract for *nisi prius* that the assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaint was chiefly in question, or that the trespass was voluntary or malicious." [His Lordship referred at length to the judgment in *Walsh v. Walsh* (1).] I am thus very clearly of opinion that had the money lodged in this case been drawn out in satisfaction of the plaintiff's claim, and had the plaintiff then gone on and recovered (as he did) on the other count *in tort*, he would have recovered more than £5 in an action of tort, and so would have been entitled to full costs.

And is there anything anomalous or contrary to any presumed rule of policy in so holding?

The policy of the law limiting or excluding costs in certain cases is no doubt this: that where a cheap tribunal exists for deciding very small cases (their smallness being legislatively defined) it is an oppressive thing, or, at least, an unmeritorious thing, for the plaintiff to select a costly tribunal for their determination. Prior to the Statute of Gloucester (6 Ed. I., c. 1; applied to Ireland by 10 Hen. VII., c. 22, Ir.) the common law gave no costs; but the juries did. Under that statute, or in analogy to it, the successful party obtained his costs. Ever since that time till modern statutes altered the law in particular cases, full costs followed the event, and there was no

(1) 17 Ir. C. L. R. 195.

Appeal.
1890.

magic in 40s. as compared with 41s., or £5 compared with £5 1s., or any other sum. But at last the Legislature determined that a check should be put upon the oppressive system of bringing actions in the Superior Courts for petty demands, which might have been recovered in the lower Courts—hence (amongst others) the sections in question. It is obvious, however, that the plaintiff still has a right to full costs, if he recovers anything, unless that right be expressly taken away by statute; and, under the enactments, we are considering it does not lie on the plaintiff in the present case to show that he is entitled to costs, but upon the defendant to show that he is *not*.

At what moment of time is it to be ascertained whether a plaintiff has or has not a cause of action fit to be prosecuted in the Superior Courts? He must, no doubt, decide the question for himself in the first instance. But the law decides it when, either by the confession of his opponent or by the verdict of a jury, or by both, he has established a claim which, measured in money, reaches the prescribed limit. A plaintiff who has valid claims in contract, amounting in all to upwards of £20 (as the law now stands), is right in suing in the Superior Courts. Be it one bill of exchange for £21, or two for £11 each, or four for £5 5s. each, he has a right to resort to the Superior Courts, and if he succeed (that being a question to be decided beforehand at his own peril), to recover full costs, whether his success is achieved by verdict after trial, by confession of judgment, by payment into Court, or by any combination of these. In other words, his right to costs cannot be defeated, save by displacing a sufficient portion of his demand. Nor will his right to costs be defeated by his failure on particular issues. Of those he must pay the costs. But the right to general costs will not be forfeited thereby.

Now, is the case altered by the circumstance that, instead of accepting the money lodged on one part of his cause of action in full discharge of his claim, he denies its sufficiency, and fails on that issue?

I am clearly of opinion that it is not. The money when lodged is the plaintiff's. It may be a large sum, far in excess of the costs of the action. It may be a small sum, as here. In any case, once lodged, it is the plaintiff's, "recovered in the action," and may be

drawn out by him in exactly the same way as if he had accepted it in full. If he do not draw it out promptly, and there be a finding for the defendant on the issue of sufficiency, the defendant gets it back to the extent necessary to meet his costs. But those costs are costs due by the plaintiff, and the receipt of the lodgment by the defendant discharges *pro tanto* the plaintiff's debt. Therefore, in either way, the money is the plaintiff's.

But here comes in the 78th section, which is the main reliance of the appellant. Now, that section gives to the defendant the right to "judgment and his costs of suit," if he succeed on the trial of the issue. Does that mean that he is to have the costs of the action, even if the plaintiff recover on other causes of action? Most clearly not, though it is in that view of the law that the present appeal was conceived. I think it means that when there is no other question in the action, save this one (sufficiency), the successful defendant is to have judgment and costs; but that, where there are other causes of action, the defendant is entitled to the entire costs of this issue. It cannot mean that the defendant, succeeding on this issue is to have final judgment in the action, even though the plaintiff has proved and established by verdict his right to other causes of action with (say) large damages; that would be too absurd; and it was given up at the bar in the most precise terms.

In the present case, therefore, where the plaintiff has recovered in another cause of action, the 78th section (as is admitted) does not give the defendant right to final judgment in the action. It does, however, equally clearly give him the costs of the issue on which he has succeeded. But what is that issue? It arises (as the section says) "upon the issue raised for that purpose by the defence"—viz., the defence as always pleaded, "the defendant brings into Court . . . and says same is sufficient," &c. Now, this question, whether the money lodged is "sufficient, &c.," is one which has nothing whatever to do with the plaintiff's right to the money lodged. That money is (as I have shown) his. If the issue be given for him, the money is his, whether he has drawn it out or not. If it be found against him the money remains his. If, for instance, the defendant lodged £50, and the jury thought that far too much, and by their verdict found that £5 was sufficient,

Appeal.
1890.

the plaintiff's right to the whole £50 would be perfectly unaffected thereby.

The true view is that the issue is not one as to the money lodged at all in any shape or form; but is really whether the plaintiff has a right to some other money over and above that which is lodged, and which is recovered by him in the action before the issue goes to trial at all. There is and can be no issue as to the property in the money lodged. A finding on the issue as to sufficiency in favour of the defendant is merely a finding that the plaintiff has failed to establish damages arising from the admitted cause of action, *ultra* the damages which he has already by the lodgment recovered in the action. It is fitting that if he fail in this he should pay for it; and so he must. But it is a question entirely collateral to his right to the money lodged.

But it is said, with great force I admit, that this argument lands us in an anomaly, if not an absurdity. The way it is put is this: Take the present case: The plaintiff, in one count, "recovers" (in one sense) £5 by the lodgment; but he is not satisfied to accept this in discharge of his cause of action, and goes to trial on the issue of sufficiency and is beaten on it. Result "costs of suit" to the defendant. On another count the plaintiff proceeds to trial. Verdict for him, £2. Section 243 (1853) and section 97 (1856) together. No costs. Yet, if he gets his costs of suit by adding the one cause of action to the other, this absurd result follows that, from two causes of action, on one of which he gets no costs, and on the other of which he has to pay the defendant's costs, he recovers the costs of the action against the defendant. This is, no doubt, the strongest way to put the appellant's case. But is it sound? I think not. I think I have shown that it is not in respect of the part of the cause of action as to which the defendant has lodged money that the present plaintiff has to pay costs under the 78th Section at all. It is in respect of his seeking more than he is entitled to. That, however, does not affect his claim to that to which he is entitled, and which he has recovered by the action, whatever comes of his claim to more.

But then, it is said, "No doubt this £5 lodged is recovered in the action." But it is not "recovered in the action" in reference to costs, or so as to affect costs in favour of the plaintiff—for the defendant gets the costs under section 78—and therefore the finding against

the plaintiff cannot be called in aid to give him costs. This would be unanswerable if the issue on which the plaintiff failed was an issue as to the ownership of the £5. If *that* went against him, then, no doubt, he would be left to his £2 on the other count, and the legal consequences of that. But I have shown this is not so, and failure to prove damages *ultra* no more affects his right to the damages lodged than failure to prove another and independent trespass would. Nor am I at all appalled by the quasi-mathematical form of the argument. If a plaintiff suing in trespass recovers £3, no costs (section 97); if he sue in another action and recovers £3 for a different tort, no costs; yet if he combines both, with similar result, full costs. Each gives zero as to costs; yet, combine them, and you arrive at a result which is defined by law, not by mathematics. I find nothing in sections 78 (1853) and 97 (1856), which gives colour to the suggestion that money may be "*recovered in the action*," but not "*recovered in the action*" *as to costs*. The whole code in question is dealing with costs, and that alone.

Nor do I feel pressed with the argument that money lodged, though recovered in the action, will not, *per se*—*i.e.*, apart from any other cause of action—entitle the plaintiff to any costs, if on an issue as to sufficiency he is defeated. The plaintiff's right to costs only arises when he recovers judgment. If he have no judgment he has no costs, except under special enactments. But if he *have* a judgment for anything, he has full costs, unless, and in so far as, his right is not cut down by statute. The Statute of Gloucester (6 Edw. I., c. 1, s. 2) is as follows:—"And whereas before time damages were not taxed but to the value of the issues of the land, it is provided that the demandant may recover against the tenant the costs of his writ purchased, together with the damages above said." Section 53 of our Judicature Act enacts: "Subject to the provisions of this Act and of Rules of Court, the costs of and incident to every proceeding in the High Court of Justice and Court of Appeal, respectively, shall be in the discretion of the Court provided that (subject to all existing enactments limiting, regulating, or affecting the costs payable in an action by reference to the amount recovered therein) the costs of every action, question, and issue, tried by a jury, shall follow the event, unless upon application made the Judge at the trial or the Court shall for special cause

Appeal.
1890.

shown and mentioned in the order otherwise direct; and any order of a Judge as to such costs may be discharged or varied by a Divisional Court. And provided also that in all actions for libel, where the jury shall give damages under forty shillings, the plaintiff shall not be entitled to more costs than damages." I therefore think that in the case before us the plaintiff has recovered more than £5 in an action unconnected with contract, that is to say, £5 by lodgment and £2 by verdict and judgment; and that his judgment carries full costs by virtue of section 53 of the Judicature Act; also that these costs are not to be diminished by section 243 (1853), nor annihilated by section 97 (1856), because though his judgment is only for £2, he has recovered more than £5 in the action.

This result is in accordance with the decision in *Arkins v. Armstrong* (1), a case decided some twenty-one years ago, and never even cavilled at since. I shall not stop to read it in detail. I concur with the judgment of the Chief Baron, and the reasoning on which it is based. It is criticised on two grounds—1. That it is irreconcilable with *Walsh v. Walsh* (2); and 2, that section 78 is not stated in the report to have been referred to in the case. The Court which decided *Walsh v. Walsh* (3) was not only the same Court, but was composed of the same four Judges as that which decided *Arkins v. Armstrong* (4) a few years after. Did they purport to overrule their own decision? So far from it, they expressly re-affirmed it, and stated that it was decided wholly on section 126. The Chief Baron says (p. 381): "We so decided, not on the 243rd Section, but on the 126th, which prohibits in clear and peremptory terms the recovery of more costs than damages in an action for assault and battery, in which the jury shall find the damages to be under the sum of forty shillings, and in which no such certificate is given by the Judge. We are of opinion that where the plaintiff drew the money out of Court in full satisfaction of the cause of action in the second count complaining of a disturbance in the right of way, and proceeded upon the first count, complaining of the assault and battery, the action became thenceforward within the 126th section an action for assault and battery alone."

Can we say that that is not true? All judicial comity, all fair

(1) Ir. R. 3 C. L. 373.

(2) 17 Ir. C. L. R. 195.

(3) 17 Ir. C. L. R. 195.

(4) Ir. R. 3 C. L. 373.

dealing with other tribunals forbids it. Sectoin 126 speaks of slander and of other particular causes of action with which it deals as a special class, to be dealt with, after the finding of a jury, in a special way. Whether *Walsh v. Walsh* (1) is rightly decided or wrongly, it is decided on the view that cases where less than forty shillings was recovered were to be dealt with *per se*, and formed an exception from the general law applicable to actions of tort. That may be right or it may be wrong. But that that is the ground of decision is not alone the positive statement of Pigot, C.B., but also concurrently of FitzGerald, Hughes, and Deasy, BB. Yet all these four Judges, with their own decisions before them, decided *Arkins v. Armstrong* (2) on grounds which they state did not exist in *Walsh v. Walsh* (3), and on grounds which concededly do exist in this case. So far from weakening the authority of *Arkins v. Armstrong* (4), this circumstance, in my mind, immensely strengthens it. Even if I thought that the reasoning in *Walsh v. Walsh* (5) was not satisfactory that would not weaken my adhesion to *Arkins v. Armstrong* (6); while, if I thought it *was* satisfactory, I should still hold that it did not touch *Arkins v. Armstrong* (7).

But it is said that the 78th Section was not brought to the notice of the Court. Poor Court of Exchequer! not to know that under the Common Law Procedure Act the issue as to sufficiency of lodgment if found for the defendant entitled him to costs! Why were they allowed to remain in ignorance of a section they were acting under every day? Why did not somebody tell them that the effect of that section had been repeatedly argued before themselves, and notably in *Walsh v. Walsh* (8) itself? Every practising member of the Bar at that time, including every member of this Court, without exception, knows that it was one of the most common, and one of the most delicate duties of counsel for plaintiff or for defendant, to deal with questions of lodgment. On the one side was the danger of lodging too little, and so merely feeding the plaintiff and bleeding his attorney; on the other, the obvious objection of giving your adversary more than the measure of his due, while the plaintiff's advisers had to consider and decide whether to accept the money

(1) 17 Ir. C. L. R. 195.

(2) Ir. R. 3 C. L. 373.

(3) 17 Ir. C. L. R. 195.

(4) Ir. R. 3 C. L. 373.

(5) 17 Ir. C. L. R. 195.

(6) Ir. R. 3 C. L. 373.

(7) Ir. R. 3 C. L. 373.

(8) 17 Ir. C. L. R. 195.

Appeal.
1890.

with such costs (if any) as might accrue, or go on *at their peril*, having regard to section 78. To suggest to me that that Court of Exchequer (some of whose members knew the Common Law Procedure Act well nigh off by heart) did not know of this most working section of it—that somebody concealed it from them; that if they had only remembered it they would have decided *Arkins v. Armstrong* (1) the other way—is to make a draft on my credulity which I am not prepared to accept.

On the whole, I am sure that the result I have arrived at is the just one. Here the plaintiff, when he commenced his action, had, as is now proved, a good and proper case to bring into the Superior Courts. It was open to the defendant to save all expense further than defence by paying into Court a proper and sufficient sum of money in respect of all the causes of action to which he had no valid defence. Instead of that, he pays in on one only, traversing the others; and as to that one he also pleads a plea in bar. What is the plaintiff to do? Supposing him endowed with supernatural insight, and to be aware of the exact figures of his claim as it was to be afterwards decided, he would have drawn out the £5. This *per se* would have given him no costs. What is he to do with the claim for trespass to lands? If he goes on and recovers £2 he has shown that he had a valid claim for £7 at the commencement of the action, which is one of tort, and I suppose (though I do not really know) his right to costs would, in that case, be admitted. Mr. Cherry denied it, and Mr. Carson admitted it, and, at any rate, I think the cases prove it. But, suppose, as in this case, he disputes the sufficiency of the sum lodged, what is he to do? The defendant says in that case he goes on at his peril, the peril—namely, of losing not alone all the costs which section 78 says he must pay, and which it is clear he *must* pay, but also the whole costs of the action in which he has recovered more than £5. I cannot adopt that argument. But if it be not admitted that the money lodged can in tort be added to money recovered under another count, the result is worse. Supposing the defendant here had recognised the sufficiency of the lodgment, and drawn it out with costs, what is he to do with the other complaint? Go on and recover 40s., without any costs of action? Or enter a *nolle prosequi*, or give judgment of discon-

(1) *Ir. R.* 3 C. L. 375.

Appeal.
1890.

tinuance; paying all costs, so as to be able to sue in the County Court, although he was perfectly and thoroughly in the right when he brought this action? I decline to accede to this suggestion. [His Lordship here referred to *Richards v. Bluck* (1).] I think the decision appealed from is right.

But beyond this, I am of opinion that *Arkins v. Armstrong* (2) should be now regarded as binding, and ought not to be questioned by us. It was the carefully considered judgment of a Court consisting of four members of the very highest eminence, pronounced twenty-one years ago, quoted and referred to at least without disapproval by the Court of Queen's Bench, and expressly recognised as a binding authority by the Court of Common Pleas—never cavilled at or criticised by any Court till the present day. It is true that before 1877 no appeal lay from the Court of Exchequer on such interlocutory questions. But that rather strengthens than weakens my argument; for, of such questions, the Legislature made the Court the final arbiter; and when once a final, considered, irreversible decision was pronounced on such a point, it was for the Legislature alone, in my humble judgment, to deal with it. It would have been open to the other Courts to disregard it, had they thought it wrong; but they did nothing of the sort. On the contrary, how does the Court of Common Pleas deal with it in *Palmer v. Garrett* *Ante*, p. 74. (3)? Monahan, C.J., in delivering the judgment of the Court, says: "In our opinion, *Arkins v. Armstrong* (4) is decisive on the present application."

The case is, however, stronger than that. *Arkins v. Armstrong* (5) was not decided in a corner. It was published in the regular reports. It was cited, in argument and in judgment, in all the other Courts. If ever a practice case was thoroughly well known to the entire profession, it was.

What happens? When the Legislature passed the Irish Judicature Act, it introduced into it a section (53rd) containing words not to be found in the corresponding sections of the English Act. This was, no doubt, in consequence of the pendency of the case of *Garnet v. Bradley* (6), which afterwards went to the House of

(1) 6 C. B. 437.

(2) Ir. R. 3 C. L. 373.

(3) Ir. R. 5 C. L. 412.

(4) Ir. R. 3 C. L. 373.

(5) Ir. R. 3 C. L. 373.

(6) 2 Ex. Div. 349, 3 App. Cas. 944.

Appeal.
1890.

Lords. Now, the words of this 53rd section amount to a re-enactment of the cost sections of the Common Law Procedure Acts of 1853 and 1856, which, but for the words, "subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein," would have been repealed; and they are, at the very lowest, a legislative declaration that those sections are to remain unaffected by an enactment which, but for such declaration, would, as *Garnet v. Bradley* (1) shows, have repealed them.

Now, it is a maxim of the utmost value and of general application that, when a statute is re-enacted, or another statute is passed in *pari materia*, and using identical words, the words of the new statute are to be construed in the sense (if any) in which they have been judicially interpreted in the earlier one. This proceeds upon the conclusive assumption that the Legislature is not to be deemed ignorant of the legal interpretation of its own language. If it is intended to get rid of an inconvenient or questionable interpretation, that should be done by express enactment.

Here, *Arkins v. Armstrong* (2) was law, open and notoriously the law of the land, when the Judicature Act was passed, which recognises and re-enacts the sections in question, or at the very lowest preserves them in full force. Did it mean that they were to be re-enacted or preserved in a sense different from that which was then their legal meaning?

This is not merely the case of a judicial interpretation of an Act of Parliament, such as was pointed out by Lefroy, B., in *Phelan v. Johnson* (3): "I recollect Lord Redesdale saying that where the Court has been in the habit of putting a particular construction upon an Act of Parliament, and the Legislature have not interfered, it must be considered as the true construction of the Act."

It falls within the cases of which *Ex parte Campbell; In re Cathcart* (4) is an illustration.

Sir W. M. James, L.J., there said: "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them

(1) 2 Ex. Div. 349, 3 App. Cas. 944.

(2) Ir. R. 3 C. L. 373.

(3) 7 Ir. L. R. 527, 535.

(4) L. R. 5 Ch. App. 703, 706.

without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

In the result, therefore, I am of opinion that this appeal should be dismissed.

FITZGIBBON, L.J. :—

As I have to give a casting vote upon this exciting question of costs, I feel it my duty to give my reasons fully for concurring with the Lord Chancellor and Chief Justice.

This "action" is brought upon three "causes of action," and all the costs must have been incurred in respect of some one or more of them. If a separate action had been brought upon each of these three causes of action, the Common Law Procedure Act, 1856, section 97, enacts, in respect of the first, that the plaintiff "shall not be entitled to *any costs*." The Common Law Procedure Act, 1853, section 78, enacts, in respect of the second, that "the defendant shall be entitled to his judgment *and his costs of suit*." The Judicature Act, section 53, enacts, in respect of the third, on which the defendant has got a "clean verdict," that "the costs of the action shall follow the event." Each Act purports to deal with all the costs of the "action" to which it applies. One of these Acts applies to every part of this action taken separately; yet the contention is that the plaintiff is entitled to the general costs of the compound action, in spite of the verdict and judgment against him in two parts of it, and in spite of the Act which would disentitle him to the costs of the remaining part, if it stood alone.

It is also to be remembered that the Judge has declined to certify that the case, either in whole or in part, was fit for the High Court, and it is therefore within the category of petty litigation.

The plaintiff's argument seems to me to lead to the very "absurdity" which Crowther, J., denounced in *Smith v. Harnor* (1), and I think there are several answers to it.

I think each of the three Acts disposes of *all* the costs of that

Appeal.
1890.
Ante, pp. 82,
87.

cause of action to which its terms refer. I think, with Whiteside, C.J., in *Leonard v. Brownrigg* (1), that the attempted distinction between "action" and "cause of action" is "unmeaning," and that the language of Erle, C.J., in *Blackmore v. Higgs* (2), *mutatis mutandis* applies:—"The plaintiff brings his action for three causes; it is only in respect of one of them that he obtains a verdict for forty shillings. The plaintiff claims costs on the ground that, taking the whole of the record together, he has recovered more than £5. But I take the rule to be this, that when there are causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are for the purposes of costs to be treated as being as distinct as if there had been two separate actions. I think the plaintiff is to be in no better position by joining the whole in one action than he would have been if he had brought two."

Section 97 speaks of a "cause of action" in the singular, and says the plaintiff in such "action" "shall not be entitled to *any costs*." Section 78 disposes of the "costs of suit." Section 53 disposes of the "costs of the action." Sections 78 and 53 entitle the defendant to all costs in relation to those causes of action upon which he has succeeded. Sect. 97 disentitles the plaintiff to any costs of the only remaining cause of action. *Reddendo singula singulis*, the three sections must dispose of the whole costs of the action, if they severally dispose of the three sets of costs which make up the costs of the action; and, in my opinion, nothing can be left for the plaintiff to receive, or for the Statute of Gloucester to operate upon.

I cannot add *nothing* to a *liability*, so as to bring out as a result that there is a balance payable to the plaintiff.

But it is said that sect. 97 does not apply, and that the verdict on the first count carries costs, because the plaintiff has "recovered in the action" the £5 which the defendant paid into Court on the second count, but which the plaintiff declined to accept. Whiteside, C.J., held in *Leonard v. Brownrigg* (3), that the plaintiff, having been defeated on the issue he took upon the sufficiency of the lodgment, cannot be permitted to avail himself

Ante, p. 82.

(1) Ir. R. 6 C. L. 161, 167.

(2) 15 C. B. (N. S.) 790, 793.

(3) Ir. R. 6 C. L. 161.

of that proceeding, in which he has been defeated, in order to add the sum he might have accepted in the first instance, and which he was ultimately forced by the verdict to accept, to the forty shillings recovered on his count in trespass, and thus evade the operation of all the Acts, and mulct the defendant in the costs of a petty action.

Though the plaintiff has got this £5 through the action, he must show it to be money "recovered in the action" within the meaning of sect. 97, and for the purposes of costs. For two reasons, I think this is not so. First, I cannot read "action" in sect. 97 in any wider sense than "suit" in sect. 78, or in a different sense from "action" in sect. 53. If sect. 97 is not to be confined to the verdict on the first count, and the £5 lodged upon the second count is "recovered" in the "action" as a whole, why are not the "costs of suit," to which the judgment entitles the defendant upon the second count under sect. 78, to include the general costs of the suit? Again, the "event" of the "action tried by a jury" under sect. 53, governs the costs of that "cause of action" on which the verdict was found, and I hold that no part of the action, the costs of which are separately but completely disposed of by one section, can supplement another part of the action, for the purposes of costs, or to prevent the application of another section to the costs of a distinct part of the action. Money found sufficient upon an issue tried under sect. 78, with the result of judgment for the defendant, cannot, in my opinion, be treated as money "recovered in the action" for the purposes of sect. 97.

I say nothing against the authorities, such as *Richards v. Bluck* (1), which hold that money *accepted* is "recovered in the action." In such cases there are no conflicting enactments, and there is no contradiction of the record; but where an issue is tried, and sect. 78 applies, the principle stated by Pigot, C.B., in *Farmer v. Fottrell* (2) comes into operation:—"The Legislature making express provision for the costs in the two opposite cases, neither party can obtain more than what the Legislature so provides." On the same ground, I distinguish the authorities which treat any number of debts or torts as *cumulative* and hold that where there is an *aggregate result* in favour of the plaintiff

Appeal.
1890.

which exceeds the statutory limit, he is entitled to costs, as he is plainly entitled to include money lodged and found insufficient in the sum "recovered" for the purposes of costs. Ball, J., in *Hughes v. Guinness* (1) gave a cogent reason for so holding when he pointed out that otherwise every defendant might take a discount off his just liability, by lodging such a sum as would render it impossible for the plaintiff to recover, over and above the sum lodged, enough to carry costs.

All the cases except *Arkins v. Armstrong* (2) are distinguished from the present by sect. 78, and by the judgment for the defendant on the second count. There is no reported authority dealing with sect. 78, and there is no evidence whatever that there is any settled practice affecting cases under that section. It is, in my opinion, for our present purpose, fatal to the authority of *Arkins v. Armstrong* (3), that the 78th section is never mentioned throughout the report. If it was not considered, the only question in this case was overlooked. If it was considered, we don't know how the Exchequer got over it, and we therefore can derive no help from their authority now.

I think the judgment under sect. 78 precludes us from treating the money lodged on the second count as for any purpose "recovered in the action." "Recovered" is a technical term. When a plaintiff succeeds, the *judgment* is that he do "recover" the amount ascertained to be his due. When a defendant succeeds, the plaintiff "recovers" nothing, and the old form of judgment was that the "plaintiff do take nothing by his writ." When the plaintiff declines to accept a sum paid into Court, the issue of its sufficiency becomes an issue going to the root of the action, and defeat upon it entails "final judgment" for the defendant, "with his costs of suit." It is against the record, as well as against the terms of section 78, to hold that the money which the plaintiff has declined to accept, which the jury have found to be sufficient, and in respect of which the defendant has got judgment, has been nevertheless recovered in the action, for the purposes of another statute dealing with another cause of action.

Pigot, C.B., in *Walsh v. Walsh* (4), speaking of a lodgment and

(1) 4 Ir. C. L. R. 314, 317.

(2) Ir. R. 3 C. L. 373.

(3) Ir. R. 3 C. L. 373.

(4) 17 Ir. C. L. R. 195, 201.

Appeal.
1890.

acceptance upon a count for disturbing a right of way, seems to me to use language applying even more forcibly to a lodgment refusal and verdict of sufficiency: "Upon the plaintiff's acceptance of the money, the cause of action in the second count was completely at an end, the demand upon it *being satisfied*, under the statute, by such acceptance; and the action was then no longer an action for the disturbance of a right of way, and for assault and battery, but became by the plaintiff's own act an action solely for assault and battery; and as such, and as such only, was by the plaintiff prosecuted and brought to trial." That this passage is no mis-report, no passing *dictum*, but states the very ground of the decision, is demonstrated by the recurrence to the same principle at the close of the judgment, where the learned Judge says: "As Erle, C.J., and the rest of the Court treated the action in *Blackmore v. Higgs* (1) as in substance only an action for an assault upon the female plaintiff, because the event of the trial and the verdict of the jury showed that no other cause of action existed, so, in the present case, we ought to hold that this was an action for assault and battery only, after the plaintiff had accepted the money lodged in full satisfaction of his other demand for the disturbance of the right of way, because by his own act he had removed all question upon that other demand, and *had prosecuted the action for no other purpose* than that of recovering damages for the assault and battery." The Court held, accordingly, that the case came within the Act of 1853, section 126, because, *treating the action as an action for assault and battery only*, the jury had found damages under forty shillings. How can the plaintiff here be better off, through having prosecuted the second cause of action to a verdict and judgment against him, than he was in *Walsh v. Walsh* (2) when he accepted the money lodged in satisfaction of his demand? I am not able, satisfactorily to myself, to reconcile the judgment in *Walsh v. Walsh* (3) with the cases where money accepted has been treated as "recovered in the action," but with the passages I have read from that judgment, directly applicable as they are to the present case, I cannot explain away *Walsh v. Walsh* (4) as a mere decision on the terms of the 126th section; and when I

(1) 15 C. B. (N. S.) 793.

(2) 17 Ir. C. L. R. 195.

(3) 17 Ir. C. L. R. 195.

(4) 17 Ir. C. L. R. 195.

Appeal.
1890.

compare the terms of the 126th with the 243rd and 97th sections, I cannot account for the subsequent decision in *Arkins v. Armstrong* (1) otherwise than by a total omission to consider section 78.

The present Chief Baron, in his judgment below, failed to reconcile *Walsh v. Walsh* (2) with *Arkins v. Armstrong* (3), and I am in the same position, and the attempts to reconcile the two cases, including the observations of Pigot, C.B., only strengthen the suspicion that section 78, on which this case really turns, somehow escaped all notice in *Arkins v. Armstrong* (4).

If the second count stood alone, and the defendant had got a verdict and judgment upon it with his costs of suit, on the issue of sufficiency, nothing could, in my opinion, under section 78, have been legally described as "recovered in the action" by the plaintiff. If this be so, it seems doubly unreasonable to hold that the sum lodged upon that second count was "recovered" within the meaning of another section, with the result of entitling the plaintiff to the costs incurred with respect to another cause of action, notwithstanding that the Judge who tried the case declined to certify that it was fit for the High Court.

For these reasons, apart from the authorities, I should have had no doubt that the plaintiff can get no costs, and that he must pay the defendant's costs incurred in relation to the causes of action in the 2nd, 4th, and 5th paragraphs. Though none of the authorities are binding upon this Court, they are deserving of respect, but I have the less hesitation in dealing with them because they are conflicting. The Irish cases are now for the first time reviewed on appeal, and I can see no evidence that there is any settled practice on the point. The remark of Lefroy, C.J., in *O'Rorke v. McDonnell* (5) seems apposite:—"It would appear to be a matter of very great difficulty to find some one point upon which there is an entire concurrence of opinion." There are, however, some authorities and some principles deducible from them, in addition to those already referred to by my colleagues, which seem to me to support the conclusion at which I have arrived. *Wheeler v. The United Telephone Co.* (6), one of the only two decisions of the

(1) *Ir. R.* 3 C. L. 373.

(2) 17 *Ir. C. L. R.* 195.

(3) *Ir. R.* 3 C. L. 373.

(4) *Ir. R.* 3 C. L. 373.

(5) 13 *Ir. C. L. R.* App. 8.

(6) 13 *Q. B. Div.* 597.

Appeal.
1890.

English Court of Appeal which have been cited, goes far to show that nothing is in the legal sense "recovered" in the action "when an issue of sufficiency is joined and found for the defendant." The same case gets rid of the arguments founded on the alternative traverses pleaded with the lodgment, for the judgment of Williams, J., was reversed, and the Court of Appeal unanimously held that, since the Judicature Act, even when the payment into Court is pleaded in the alternative, it is a "*defence to the action.*" Lord Esher says:—"If it succeeds, the result is the same as if under the old system of pleading the jury had found in favour of one plea which went to the whole of action." If, instead of a lodgment, the plea had been leave and license, or a justification, and had been found for the defendant, the "judgment" would have been the same, and, in my opinion, the answer to the question whether *upon that cause of action* the plaintiff had "recovered" anything, must also be the same.

If the alternative traverses here had been found for the defendant, as they might have been, it would, nevertheless, be contended that the £5 was "recovered in the action." The trial would have established that the plaintiff never had any right to the money, yet he would have got it in the same sense as he has now got it. Even now, for all we know, the jury may have thought a farthing enough. If the jury had found on the traverses that the plaintiff was entitled to nothing, I think it would have required a remarkable stretch of judicial courage to hold that the amount had been "recovered in the action," which, to borrow an expression of Thesiger, L.J., in *Berdan v. Greenwood* (1), was "obtained through the timidity of the defendant," contrary to the verdict of the jury, and contrary to the judgment on the record.

The authorities on pleas of tender and set-off also appear to me to have an important bearing. In cases of tender, though the sum tendered necessarily remained unpaid at the date of action brought and was afterwards brought into Court, and was in that sense "recovered in the action," it was held that the plaintiff's right of action was *defeated* to the extent of the money tendered and that the sum "recovered" was only the surplus: *Dixon v.*

(1) 3 Ex. Div. 251, 257.

Appeal.
1890.

Walker (1). The same principle, after a conflict of authority, was extended in *Beard v. Perry* (2) to cases of set-off, notwithstanding that when the action was brought the full debt was due, and that the plaintiff could not anticipate whether the defendant would plead the set-off or not. Cockburn, C.J., says:—"The sum "recovered" is the balance; for although in one sense the plaintiff recovers his whole debt, because practically he gets that part which strikes off so much of the set-off as is owing to his adversary, yet he only actually receives the balance. It is indeed, hard on the plaintiff that he must run the risk of losing his costs in such cases, for he may not know the amount of the set-off, or whether the defendant will plead it." Is not this reasoning, holding in a case of set-off that the *judgment* is conclusive as to the amount "recovered," directly applicable to this case, where money lodged is sought to be used in identically the same way, to get rid of costs incurred through the plaintiff's wilful refusal to accept what was due to him.

A practice is thus established in England, on both tender and set-off, inconsistent with the plaintiff's contention, though the amount of the tender or set-off is just as much "the plaintiff's money" as is the money lodged here. Under these circumstances I do not recognize the sanctity, or even the existence, of the alleged practice founded on *Arkins v. Armstrong* (3). That case has been referred to, no doubt; but it has not been *acted on* in a single reported case that I can find.

It is an assumption that (borrowing an expression from the Master of the Rolls) transcends my "judicial credulity" that, in passing the Judicature Act, the Legislature intended to give the force of a statute to a practice under *Arkins v. Armstrong* (4) which must be a practice under section 78, if it is to bind us in this case—and I cannot hold that case to have settled the construction of, or settled the practice under, a section which was never once mentioned in the course of it.

Again, when the Judicature Act, Section 53, was passed, the decision of the English Court of Appeal in *Garnett v. Bradley* (5)

(1) 7 M. & W. 214.

(2) 2 B. & S. 493.

(3) 1r. R. 3 C. L. 373.

(4) 2 B. & S. 493.

(5) 2 Ex. Div. 349.

was in force, and the effect of the Act would have been to assimilate the law in the two countries but for the subsequent reversal of that decision by the House of Lords, which has, beyond all doubt, left the Irish Courts under legislative limitations with respect to costs, from which the English tribunals have been held to be free. Under such circumstances, the argument from supposed sanction of reported cases by the Judicature Act seems to me to lose almost all weight.

I think the order appealed from should be discharged, and that the plaintiff should be declared entitled to no costs; that the defendant should be declared entitled to all his costs incurred in relation to the causes of action mentioned in the 2nd, 4th, and 5th paragraphs of the statement of claim, except the costs of those issues upon which the jury have found for the plaintiff. The defendant ought not to get any costs of the motion in the Court below, nor of the appeal, because he has, down to his notice of appeal, endeavoured to support the certificate of the Taxing Master, which gave the defendant the "general costs of the action," upon a construction of section 78 analogous to that which we hold to be erroneous in the case of section 97.

BARRY, L.J.:—

Concurring, as I do, in the conclusion arrived at by the Master of the Rolls, it would be idle on my part to deliver a lengthened judgment, which could only have the result of repeating in a weakened form what the Master of the Rolls has expressed in so clear and able a manner.

The right of a successful plaintiff to costs is founded on legislation so old as almost to be regarded as part of the Common Law. I believe the first movement to alter it was a Statute of Elizabeth, which was followed by the subsequent statutes, limiting the costs in actions of assault, slander, and trespass, where the plaintiff did not recover more than 40s. After that, the next step was the Rules of 1834 in England. The provisions as to actions of assault, slander, and trespass are to be found in section 126 of our Common Law Procedure Act of 1853, a section of much importance in this case. By the Rules of 1834 it was provided that where the amount recovered in actions of assumpsit, debt, or covenant, should not exceed

Appeal.
1890.

£20, the plaintiff's costs should be taxed according to a reduced scale. The words are "recovered by the action;" and it was decided in *Fewster v. Boggett* (1) that "recovered by the action" included money lodged in Court. In 1852 the Procedure Act was passed in England, from which our Act of 1853 was taken. The words in the section of the English Statute are "recovered in the action;" it also contains a clause (section 73) the same as our section 78. It is urged, on behalf of the defendant, that there is no English case deciding that under such a state of facts as exists here a plaintiff is entitled to costs. To this argument it may fairly be replied that the absence of authority may arise from the fact that no one ever disputed the plaintiff's right to costs under such circumstances, although it is incredible but that a similar state of facts must have arisen in England in the vast and varied litigation of that country.

What is the meaning of the word "recovered?" I take it from *Parr v. Lillicrap* (2), a decision under section 11 of 13 & 14 Vict., c. 61 (the English County Courts Act), which deprives the plaintiff of costs in actions of contract if he recovers less than a certain amount. The action was for £12 5s. 6d. for goods sold and delivered, and the defendant pleaded to the whole action payment into Court of the entire sum. The plaintiff accepted that sum in full satisfaction, and the question then was: Did he recover that sum by the action? Pollock, C.B., said: "The case put by my brother Bramwell shows what is the meaning of the word 'recover' in 13 & 14 Vict., c. 61, s. 11. It does not mean 'recover' by verdict or judgment, but 'obtain' by means of the suit." *Obtain by means of the suit.* How much did the plaintiff "obtain" here? £7. According to the Lord Chief Justice it is a fantastic interpretation of the section to call in aid the £5 to enable the plaintiff to recover costs. In my opinion it is quite as absurd that if £5 is paid into Court, and the plaintiff recover 1s. more, he is entitled to full costs, although the Legislature passed these Acts to put a stop to trivial litigation.

It is not disputed that if there are two actions for tort, and the plaintiff recovers £3 in one and £3 in the other, he gets no costs; but that if the plaintiff combines the two actions, by bringing one action with two counts, and recovers £3 upon each count, he is

(1) 9 M. & W. 20.

(2) 1 H. & C. 615.

entitled to full costs. A maxim quoted by counsel was, *Ex nihilo nihil fit*. I fail to see the application to the result of this action. The plaintiff was a richer man by £7. It is said that though he might have drawn the money out, he did not do so; and as he failed to do so before verdict or judgment, the amount lodged is liable to the defendant's costs under section 76; but that is a collateral liability. I cannot put any other interpretation on the result than that he has recovered £7.

Again, I am asked in this case to overrule the express decision of *Arkins v. Armstrong* (1), decided over twenty-one years ago by the Court of Exchequer, which consisted of four such Judges as Pigot, C.B., and Fitzgerald, Hughes, and Deasy, BB., who, after a full and elaborate argument, reserved their judgment—Pigot, C.B., as competent a lawyer as ever lived; Deasy, B., afterwards, as Lord Justice of Appeal, a member of this Court; Fitzgerald, B., *clarum et venerabile nomen*; and Hughes B., an able common law Judge. *Arkins v. Armstrong* (2) was decided by that Court, and it admittedly rules this case. How is it to be got rid of? It is said that section 78 was unknown to the Judges. I decline to entertain that idea. They must have considered sections 75, 76, and 77, and they must surely have seen section 78. But we are asked to overrule *Arkins v. Armstrong* (3) as being inconsistent with *Walsh v. Walsh* (4). It was the same Court, consisting of the same Judges, which decided *Walsh v. Walsh* (5), and the subsequent case of *Arkins v. Armstrong* (6). As soon as *Walsh v. Walsh* (7) was referred to in the argument here I suggested that the decision might be found to turn on section 126 of our Procedure Act, relative to costs in actions of assault; and I was right. In *Walsh v. Walsh* (8) the Chief Baron, in stating the facts, says (page 198): "At the trial before me the jury found in the affirmative of the issue, and assessed the damages at £1. No certificate was given under the 126th section of the Common Law Procedure Act that the assault and battery had been proved; in fact, no battery was proved at the trial." Further on in his judgment he refers to the 243rd section: "If the plaintiff in this action, instead of taking the money out of Court, had disputed

(1) Ir. R. 3 C. L. 373.

(2) Ir. R. 3 C. L. 373.

(3) Ir. R. 3 C. L. 373.

(4) 17 Ir. C. L. R. 195.

(5) 17 Ir. C. L. R. 195.

(6) Ir. R. 3 C. L. 373.

(7) 17 Ir. C. L. R. 195.

(8) 17 Ir. C. L. R. 195.

Appeal.
1890.

the sufficiency of the payment, and having proceeded to trial for the recovery of more, had obtained upon the first count a verdict for any amount, however small, in excess of that payment, we should have had to consider the application of those authorities. For instance, if the plaintiff had recovered on the first count 1s. damages over the £5 paid into Court and 19s. on the second count, we should have had to determine whether, although upon the count for assault and battery there was a finding for less than 40s. damages, and there was no certificate of the Judge, and although upon the count for disturbance of a right of way there was a verdict for 1s. damages only over and above the sum paid into Court; nevertheless, there was in the action a recovery of £5, of 1s., and of 19s.—in all £6, entitling the plaintiff to his full costs of suit, under the 243rd section of the Common Law Procedure Act. I am, however, of opinion that the motion before us may be decided upon narrower grounds, and may be determined upon the terms of 126th section.”

Then the question is asked—What is the meaning of section 78? It was intended to apply to a case where the money is lodged in discharge of the whole action, and the question is as to the sufficiency of the amount; if the defendant wins on that he wins the action, and gets his costs. I am of opinion that there is nothing calling on us to overrule *Arkins v. Armstrong* (1). It is a very reasonable decision, easy to work out; and, as stated by the Chief Baron, it prevents complications on the taxation of costs which would otherwise arise. If, in an altered state of society, it were found inconvenient, I suppose that the Court of Appeal could reverse it; but it is an old maxim of our law—“*stare decisis*.” Since I have come to this Court I have been coerced by that maxim to concur in decisions which seemed to me repugnant to sense and justice; such, for example, as *The Wicklow Heirlooms Case* (2) and *Sandes v. Cook* (3), and I see no reason for not abiding by it with reference to *Arkins v. Armstrong* (4).

Decision below reversed.

Solicitor for the defendant (appellant): *D. J. Higgins.*

Solicitor for the plaintiff (respondent): *R. J. Crean.*

(1) Ir. R. 3 C. L. 373.

(2) Unreported.

(3) 21 L. R. 1r. 442.

(4) Ir. R. 3 C. L. 373.

In re RACKHAM.

CARTER *v.* RACKHAM.

Chitty, J.
1889.

Dec. 5.

(*By permission, from W. N. 1889, 214.*)

Administration—Insolvent Estate—Sale of Realty—Employment of Solicitor—Taxation—Solicitors' Remuneration Act, 1881—General Order, August, 1882, Rule 6.

THE conduct of an order for sale out of Court of the testator's real estate in a creditor's administration action had been given, on the application of the plaintiff to the defendant, the devisee.

The defendant's solicitor gave notice to his client that he elected to be paid under the old system, as altered by Schedule II. of the General Order under the Solicitors' Remuneration Act, 1881. The estate was an insolvent one. The Taxing Master had only allowed the scale charge, and an application was now made to review the taxation.

Swinfen Eady, for the summons.

Martelli, *contra*, was not called on.

CHITTY, J., after dismissing the summons on the ground that the notice was ineffectual, not having been given before the work was undertaken, said that his present opinion was that in any case like the one before him, when the estate was insolvent, and where payment after taxation would not as a fact be made by the client, but out of a fund in Court, it was the duty of the devisee's solicitor, whether the sale was in or out of Court, if he desired to elect to be paid not according to the scale charges, to bring the matter to the attention of the Judge in Chambers, or at any rate to give notice of his intention to the plaintiff before undertaking any part of the business.

Solicitors: *Martelli*, for *Leathes Prior*, Norwich; *Pollock & Co.*

Lord
Chancellor.
1890.

Jan. 13.

In re HIGGINS, MINORS.

(By permission, from 23 L. R. Ir. 596).

Taxation of Costs—Perusal of Receiver's "Account" by Solicitor attending afterwards, on its passing, for party interested—Allowance of fee for—General Order of 1st June, 1882, Schedule, Item 17.

Receiver's accounts are "accounts" within Item 17 of the Schedule of Costs appended to the General Order of 1st June, 1882, and accordingly the solicitor for a party interested—*e.g.*, the guardian of the fortune in a minor matter—who attends on the passing of a receiver's account is entitled to the fees therein provided for its previous perusal.

Decision of the Taxing Master reversed.

SUMMONS on behalf of the guardian of the fortune of the minors for an order that the Taxing Master should revise the taxation of certain specified items in such guardian's bills of costs taxed in the matter, and that such items might be allowed, and that it might be referred to the Taxing Master to vary his certificate of taxation accordingly, and for the costs of the application.

The items (with the exception of No. 1,191, which was a charge of £2 2s. for making a special return of the minors' property as required by the Lord Chancellor from the guardian of the fortune, and as to which the appeal was withdrawn) were all charges by the solicitor of the guardian for perusing the receiver's accounts, on the passing of which he subsequently attended. The receiver had been directed by order to keep seven different accounts, and the accounts in question on this occasion amounted in all to 235 folios. The guardian's solicitor having served notice on the Taxing Master to state in writing his reasons for disallowing these charges.

The report of Master Coffey was as follows:—

"The several items objected to, and referred to in the summons by way of appeal, amount to a sum of £14 19s., omitting item 1,191.

"These various items are for perusal of receiver's accounts by the guardian's solicitor,

"The claim for these perusals arises under the scale of solicitor's fees attached to the Order of the 1st June, 1882, items 17 and 18.

*Lord
Chancellor.
1890.*

“The fees are as follows:—

“17. Perusal of accounts, statements, charges, discharges, or reports—Lower scale, 6s. 8d.; higher scale, 6s. 8d.

“18. Or, under special circumstances, not exceeding—Lower scale, £1; higher scale, £1.

“I am of opinion that the allowance of fees for the perusal of accounts under the above Schedule refers to accounts under investigation at Chambers in action, minor matters, and such like, being accounts of executors, administrators, trustees, &c., and does not refer to receiver's accounts, which I regard as agency accounts, for the perusal of which no fee was ever chargeable, and which are under quite a different code of rules and principles of taxation, there being a separate scale of charges applicable thereto. I therefore disallowed the charges, they being inapplicable, in my opinion, and, in the aggregate, so very considerable in amount.

“The solicitor is allowed in the costs for a copy of the accounts at each time of perusing.

“The amount charged in the costs for these copies is £17 5s., and he is allowed a charge of 6s. 8d., or more, for attending the hearing of each set of accounts; so that he is not unremunerated and may well peruse the accounts, which is not a very onerous duty for accounts made out in such a plain and well-known form.

“Item 1,191 is a fee of £2 2s. for filling up the form sent out by the Chief Clerk of the Lord Chancellor, requiring information as to the position of affairs relating to the minor matters.

“I am of opinion that this is not a proceeding in the matter, and does not carry any fee or remuneration under any schedule of fees, or any order of the Court. I therefore disallowed the charge.

“ (Signed) DAVID COFFEY.

“ We concur:

“ (Signed) JEHU MATHEWS.

“ (Signed) SYDENHAM DAVIS.

“ 14th December, 1889.”

Mr. E. T. Bewley, Q.C., in support of the application.

*Lord
Chancellor.
1890.*

LORD ASHBOURNE, C., said there was nothing in item 17 of the schedule of costs referred to to limit the "accounts" there mentioned to accounts in administration actions or proceedings of a similar nature, and that he thought that, both in reason and on grounds of public policy, the solicitor for the guardian of minors in a case like this should be allowed the costs of perusing the receiver's accounts, on the passing of which he afterwards attended.

Solicitor for the applicant: *Mr. Richard M'Namara.*

DORAN v. CLARKE.

*Ex. Div.
1890.*

(*By permission, from 24 Ir. L. T. R. 34.*)

Jan. 20.

(Before ANDREWS, J.)

Costs—Action referred to County Court—Matters of mere account—Scale of taxation—C. L. P. A. Act, 1856, s. 6.

Where a case, being matter of mere account, is referred (under Section 6 of the C. L. P. A. Act, 1856) for trial before the County Court Judge, and the order directs that "the costs of this application and of the said inquiry be costs in the cause," the plaintiff's costs of the inquiry in the County Court are to be taxed upon the High Court scale. *Wheatcroft v. Foster*, 1 E. B. & E. 737, considered.

APPEAL from a decision of Master Mathews with reference to the scale on which certain costs should be taxed.

The plaintiff had sued the defendant for a sum of £70, and moved for final judgment. The defendant on this motion admitted that a part of the plaintiff's demand was due, and denied the balance. The defendant was thereupon ordered to pay the sum so admitted, and—it being admitted that the plaintiff's claim and the defence thereto were matters of mere account—the remaining part of the action was sent for trial under section 6 of the Common Law Procedure (Amendment) Act, 1856, to the County Court Judge of Antrim, and the order directed "that the costs of this application and of the said inquiry be costs in the cause." The case was heard in the County

Court—first, by consent, before the Registrar, and subsequently before the County Court Judge, who certified that the defendant was indebted to the plaintiff in the sum of £54. The plaintiff's costs were thereupon furnished for taxation, and the costs of the inquiry before the Registrar and County Court Judge were furnished on the Superior Court scale of costs, and they were taxed on that scale by the Taxing Officer.

Cuming, for defendant, in support of the appeal:—The case has been sent for trial to the County Court Judge. That trial took place in the County Court, and the costs of that trial should be taxed with reference to the County Court scale of costs. *Wheatcroft v. Foster* (1), substantially governs this case. There a case was sent for trial to the County Court under section 26 of the 19 & 20 Vic., c. 108 (English County Court Act), a section very similar to the present. The Court of Queen's Bench held that the costs of the trial in the County Court should be taxed on the County Court scale, and not on that of the Superior Court. All the judges in that case go on the fact that the trial in the County Court is a proceeding in the County Court. The English Act specifically gives the power which is impliedly given in the Irish Act. The mere fact that more than £50 was recovered does not prove anything—if the amount recovered had been £20, the same contention could have been made. If a case is sent to the Master of the High Court costs are retained in the jurisdiction of the Master: so, too, in case of arbitration; but here the case was sent to the County Court and tried there, and the costs were made costs in the cause. They should be taxed on the Superior Court scale so long as the proceedings were here, and on the County Court scale so long as they were in the County Court: *Moody v. Stewart* (2).

Whitaker, contra:—The practice has always been to tax such costs on the Superior Court scale of costs. In the case of *Calwell v. Boyd* this was done by the Taxing Master. The section enables a judge to send a matter of account to the Master of the Division or to a County Court Judge. Had the account been taken before the Master the plaintiff would be entitled to his costs as on the

(1) 1 E. B. & E. 737.

(2) 5 Ir. L. T. 25, 19 W. R. 161.

Ex. Div.
1890.

Superior Court scale, and the County Court Judge in this case is an officer of this division for the purposes of taking the account. The case is still in this division. *Wheatcroft v. Foster* does not apply. No application or order was there made as to the costs. The only referee under the English Act, s. 26, is the judge of the County Court.

[ANDREWS, J.—The English Act does not go so far as our Remitting Act, s. 5, and does not give power to remit a matter of mere account beyond £50].

The only provision under the rules of the County Court is in remitted actions: Carleton, p. 931. There is no scale applicable to a case of this kind. We submit that the costs must be governed by the scale used in this Court.

[ANDREWS, J.—I have, of course, jurisdiction; the question is whether the officer is right or wrong in adopting the scale used in the High Court, or whether he ought to have adopted the scale used in the County Court as nearly as he could].

ANDREWS, J.—This case of *Clarke v. Doran* is an application to review the taxation of costs in this action under the following circumstances:—Upon an application being made on the 18th of December, 1888, for final judgment, it appeared that a substantial portion of the plaintiff's claim had been paid, and that the balance had reference only to matters of account, and accordingly with the assent—and very properly with the assent—of the parties the case was referred, under the 6th section of the Common Law Procedure Act, 1856, to the County Court Judge of the county of Antrim, to take an account between the parties, and the order provided, that when the County Court Judge came to a decision and announced his finding, judgment should be entered accordingly, without the necessity for further application. But that order of the 18th of December, 1888, said, in the terms which are usual in every one of these orders which I have ever been in the habit of seeing, dealing with a mere matter of account, “that the County Court Judge do strike a balance, that the defendant do forthwith give particulars of his set-off, and that the costs of the motion be measured at the sum of three guineas,” and that the costs of that reference on both sides be costs in the

Ex. Div.
1890.

cause. The plaintiff having succeeded and established upwards of £50, to be due over and above a sum of £42, which was paid before the case went into Court, entered judgment and brought the matter before the Taxing Officer, and the Taxing Officer having taxed these costs on the analogy of the scale applicable to proceedings in the Superior Courts—which appears to be giving them on a higher scale than if they were taxed on the scale applicable to proceedings in the County Court—the application before me was that he should review his taxation and allow them on the analogy of the scale which would be allowed if the proceedings had taken place under the County Court jurisdiction. In support of that contention a case was cited, *Wheatcroft v. Foster* (1), which was decided under the 26th section of the English County Court Acts Amendment Act, 19 & 20 Vict., c. 108; the Court in England decided that in a case in which under that 26th section, a matter had been referred to a County Court to try, it being a money demand for goods sold and delivered the Taxing Officer was correct in the view which he took of taxing the costs as nearly as possible on the analogy of the scale applicable to County Court proceedings, and refused a revision of the taxation on the analogy of the scale applicable to Superior Court proceedings; and if that case, which was decided in 1858, a considerable number of years ago, and which I am bound to say had not been brought before my attention on a previous occasion, was not distinguishable from the present case, so much of the judgments of the learned Judges there would be applicable to the present case that I feel it would deserve great consideration, but I have come to the conclusion that that case ought not to be followed. I think it might to some extent be laying down a new principle and a novel scale of taxation, which up to the present I have not been aware of as existing, for the guidance of the officers of the Court. The 20th section of the County Courts Acts Amendment Act, 1856, under which the action was remitted (the action itself and the trial of it was remitted in the case of *Wheatcroft v. Foster*), only authorises the Superior Court where the demand does not exceed £50, or has been reduced by payment or set-off under that sum, not to refer the case to the County Court as an alternative to making certain

(1) 1 E. B. & E. 737.

Ex. Div.
1890.

other references, as our Act does, to investigate the matter and bring it back to the Superior Court, but actually to try the action. But it is quite true that under the 6th section of our own Common Law Procedure Act, 1856, the action is not tried by the Superior Court, because the County Court's determination comes back to the Superior Court under that section, and the final order is not made by the County Court, but by the Superior Court. But under the English Act there is no alternative. There the reference must be to the County Court Judge to try the action—not to inquire as an officer or assistant of the Superior Court, but to try the action—and the reference must be made to him alone. Now, our Common Law Procedure Act of 1856, section 6, authorises the reference to be made not only to the County Court Judge in country cases, but to the Master of the Court or to an arbitrator appointed by the parties. And in addition to that, the order in *Wheatcroft v. Foster* was absolutely silent altogether in reference to costs, whereas in this case the order has directed the costs of the reference on both sides to be costs in the action. Now, the order that was sent down to the County Court Judge was simply to gain his assistance in making a finding. His finding came back and became a judgment of this Court, and under these circumstances the Taxing Officer has reported that the proper scale of taxation was that which is applicable in the Superior Court, in which he found, according to his view, the proceedings had, in fact, taken place. It appears to me that if the reference had been sent to the Master of the Court, and the costs of the reference came to be taxed, the Taxing Officer would have nothing to justify him in departing from the scale of the Superior Court, and of his own motion adopting the scale of some other Inferior Court. Now, on the following grounds I think, except in respect of a matter to which I shall refer further on, the Taxing Officer's taxation ought not to be reviewed, and that this application ought not to be granted. In the first place, the true interpretation of the Order appears to me to be that, when a Judge of a Superior Court is dealing with a case in the Superior Courts, directing an inquiry for the assistance of a Superior Court, the result of which is to be brought back and entered as a judgment of that Court, and then dealing with the costs, the costs he seems to be dealing with are costs in the Superior Court. If, upon

making the Order, it had been directed that the costs of the reference should be taxed on the County Court scale, I would have regarded that as a special Order in relation to the matter, and I think I would have been bound to hear what both sides had to say in reference to it. But, I think the order is not one which would warrant me in directing a revision of the taxation, and in addition I think that the case of *Wheatcroft v. Foster* does not apply, because there the order of reference was different, and in that case the order was absolutely silent as to costs. But I find that through an oversight, which must have arisen from something very like carelessness on one side or the other, the Taxing Officer was given the trouble of taxing a very considerable number of items in relation to the costs of the motion, the order which has been produced before me not having in it the amendment that was made pursuant to an order of this Court measuring the costs at the sum of Three Guineas, and inasmuch as that has been brought under my notice I do not feel myself warranted in doing an injustice to the party, which would be entailed in disregarding the order in which the costs were measured, and therefore I shall direct a revision so far as that part of the order is concerned. The rule must be "no rule" on the defendant's application contained in the summons of the 24th of December last, but it appearing to the Court that the amending order which was made on the 18th of December, 1888, measuring the cost of the motion for final judgment at Three Guineas, was not brought to the knowledge of the Taxing Master, that the order be referred back to the Taxing Master for revision, having regard to the said amendment, and under the circumstances the defendant must pay the plaintiff a fairly measured sum as the costs of this application.

Order accordingly.

Solicitor for the plaintiff: *F. Kerr.*

Solicitor for the defendant; *Messrs. O'Rourke.*

Andrews, J.
1890.

Feb. 28.

HAIG & SONS v. COOKE.

(Before ANDREWS, J.)

(By permission, from 24 Ir. L. T. R. 56.)

Equity civil bill appeal—Appellate tribunals in appeals from Recorder of Dublin under County Court Appeals Act, 1889—Power of County Court Judge to measure costs of suit.

When a County Court Judge declares a party to an equity suit entitled to his costs of suit, he has no jurisdiction to measure a sum for such costs, in the absence of any application by the solicitor of one of the parties that a percentage or a commission should be allowed to him in lieu of such costs. The costs must be taxed by the proper officer in the ordinary way.

A judge sitting at Nisi Prius has jurisdiction to hear an equity civil bill appeal under Sections 3 and 11 of the County Court Appeals Act, 1889, 52 & 53 Vict., c. 48; but *quære* if such appeal should not be brought before a judge of the Chancery Division.

APPEAL from so much of a final decree of the Recorder of Dublin made on the 13th of February, 1890, as measured the plaintiff's costs of suit at a sum of £35. The suit was brought by a puisne incumbrancer to raise the amount of his charge, and by the primary decree a sale was directed, which was finally carried out, and the proceeds of the sale were lodged in Court. When the proceeds of the sale came to be allocated amongst the persons entitled, it was found that they would not satisfy all the incumbrancers on the property that had been sold. By his final decree the Recorder declared the plaintiff entitled to his costs of suit, which, however, the decree directed to be measured at a sum of £35, and the decree went on to direct payment of the different incumbrances in their respective priorities. The plaintiff appealed from so much of the decree as measured his costs at £35.

When the case was called, Mr. Justice Andrews said that he was of opinion that under the provisions of Sections 3 and 11 of the County Court Appeals (Ireland) Act, he, sitting at Nisi Prius, had jurisdiction to hear the appeal, but that it might be that the meaning of the 11th Section of the County Court Appeals (Ireland) Act, 1890, was that appeals under the Act from the Recorder of Dublin should be heard by a Judge of the Chancery Division.

Leech, for the appellant, referred to Order XXVIII., Rule 209, of the County Court Rules, 1877, which directs that all costs in equity suits are to be taxed by the Clerk of the Peace or Registrar, and Rule 10 of the same Order, and Order XXIX., Rule 231. In the scale of fees under Part II. of the County Officers and Courts (Ireland) Act, 1877, made in February, 1878 (1) a County Court Judge may allow a percentage or commission in lieu of costs, but this can, according to the words of the Order, be allowed on the application of the solicitor having carriage, or of the solicitor for any party interested in the suit. Rule 6 (2) of the same Order allows the County Court Judge to measure a party's costs of suit, *if at any period of the suit the suit is terminated by compromise*, and the fact that such a limited power is expressly given points to the fact that a County Court Judge has not power to measure costs. Section 34 of the County Officers and Courts (Ireland) Act, 1877, gives a County Court Judge all the powers of a Judge of the High Court of Chancery, but a Judge of the High Court of Chancery had not the power claimed by the County Court Judge here. See *Bewley and Richey's Chancery Act*, p. 249. Order XV. of the Orders of the Court of Chancery of 1868 gives a Judge of the Court of Chancery power to measure costs of *interlocutory applications* only. Section 79 of the Judicature Act (Ireland), 1877, provides that the Rules of Practice, &c., to be made by the Orders under the Judicature Act are not to apply to County Courts unless County Courts are mentioned in the Order. Therefore Order X., Rule 26, of the Judicature Rules of 1878 does not apply to County Courts. Section 53 of the Judicature Act (Ireland), 1877, only confers a discretion whether or not to allow costs, and when the Judge has decided that the plaintiff was entitled to costs, he had no further discretion.

Andrews, J.
1890.

ANDREWS, J.: There seems no one on behalf of the respondents to give me any assistance; but Mr. Leech, who has argued the case for the appellant, has given me great help, and has referred me to all the sections of the Acts of Parliament and the various County Court rules bearing on the question.

If I had any reasonable doubt to justify me in putting the parties

Andrews, J.
1890.

to further expense, I would reserve a question for the Court of Appeal. I have no reasonable doubt, however, on the limited question before me, and I shall dispose of it.

I do not decide one way or the other the question whether a County Court Judge has jurisdiction in equity to refuse costs to a successful plaintiff, or to impose terms upon him in the event of costs being given. I deal with this case as one in which the Recorder has adjudicated that the plaintiff is entitled to his costs of the suit. There is nothing to show that he is not entitled to the costs of a proceeding by which he has obtained relief, and there is no indication on the face of the documents that the plaintiff has done anything to disentitle him on any equitable principle to his costs, and I shall treat this as a case in which it has been properly adjudicated that he is so entitled, and the limited question I have to decide is whether, under these circumstances, the County Court Judge can measure the plaintiff's costs, or whether the costs should be referred for taxation in the ordinary way.

On examination of the rules and Acts of Parliament that have been referred to, and in the absence of any provision enabling a County Court Judge to measure the costs of a suit, I am of opinion that the plaintiff was entitled to have his costs referred for taxation, and, therefore, I shall direct that the final decree of the 13th of February, 1890, shall be varied by omitting the words, "being measured at £35," wherever they occur in the decree, and that in lieu of the words so omitted there be inserted the words, "to be taxed according to the course of the Court," and that the final decree be referred to the learned Recorder for revision of the schedule thereof having regard to this decision, and that the plaintiff be allowed the costs of his appeal on the lower scale as part of his general costs of suit, and that the £5 lodged by the plaintiff by way of security with the Clerk of the Peace be returned to him.

W. T. Flood, solicitor, for the appellant.

THOMPSON v. MOORE.

M. R.
1890.

(By permission, from 25 L. R. Ir. 98.)

March 10.

Taxation of costs—Party and party—Fees to scientific witnesses for qualifying to give evidence—Rules S.C., April, 1878—Order X., Rule 8—Cost of briefing proceedings in action in which a question similar to that in issue was involved.

Fees to scientific witnesses for qualifying themselves to give evidence may in proper cases be allowed as between party and party, when sufficient information as to how the amount of such fees has been made up is laid before and considered by the Taxing Master.

The rule as to special fees paid to counsel is applicable to the case of scientific witnesses, and special fees paid to experts of peculiar eminence, even when taxable between solicitor and client, will not be allowed as between party and party.

The costs of briefing the proceedings in an action in which a question similar to that in issue was involved disallowed as between party and party.

APPEAL from the decision of the Taxing Master, allowing the costs of briefing proceedings and judgment in a case of *Thompson v. Batty*, in which the questions at issue were similar to those in the present case; and as to the amount allowed by the Taxing Master to Sir Frederick Bramwell as fees for preparing himself to give evidence. The decision, so far as it allowed fees to Sir Frederick Bramwell's assistants, was also appealed from (1).

Mr. Robertson, Q.C., for the defendant :—

For what are we pay this money? The only thing that can be allowed is a reasonable sum to the witness for qualifying himself to make the affidavits and for investigating and making up the case; anything else does not come within the rule. What fee is to be paid for that? The Taxing Master had nothing whatever to guide his judgment, and he has not exercised his judgment. All Mr. Inray asks for is a fee of making up the case. Sir Frederick Bramwell cannot get more. The very fact that Mr. Inray only gets £8 8s. will determine Sir Frederick Bramwell's fee. Anything more is a special fee.

(1) See the report of the motion for attachment in this Court and of the appeal, 23 L. R. Ir. 626.—Rep.)

M. R.
1890.

Mr. Bewley, Q.C., for the plaintiff:—

Is this a matter for the Taxing Master, and has he exercised his discretion. If so, the Court will not interfere; *Mackey v. Chillingworth* (1), *Turnbull v. Janson* (2). In that case the Court were unanimously of opinion that the Court has no jurisdiction if the Master has exercised any discretion. *Lopes, J.* (p. 271), says: "The plaintiffs seek to have the taxation reviewed in respect of five matters; as to the first three, I agree with my brother Lindley, that they are matters purely of discretion, and that there is no ground for the interference of the Court": *Smith v. Buller* (3), *Batley v. Kynock* (4).

THE MASTER OF THE ROLLS:—

I am of opinion that the briefing of the proceedings in *Thompson v. Batty* cannot be properly charged as between party and party in this action. As between solicitor and client it may have been quite proper to brief for the information of counsel the proceedings in another case; but the cost cannot be charged against the opposite side.

As to the expense of witnesses' affidavits, I do not see any sufficient reason to interfere with the amount allowed in respect of Mr. Imray; but as regards the taxation of the expenses of Sir Frederick Bramwell's affidavits, I think the amount allowed must be reduced. No doubt, a successful party should, so far as is reasonable, be indemnified from the expense he is put to in an action. In this particular case the fees which were charged (£79 15s. 9d.) were, in first instance, allowed *in globo* by the Taxing Master, who had nothing before him to show how that very large sum was arrived at, and without any information or inquiry as to how it was made up; how many hours' work is charged for, or at what rate; not how much was charged for Sir Frederick Bramwell's time, and how much for his assistants. It is, no doubt, proper in some cases to allow a scientific witness remuneration, for time occupied in preparing himself to give evidence, but the Taxing Master in this case appeared to me to have exercised no discretion whatever in the matter. He did not know at what rate or for what length of time

(1) 2 C. P. Div. 273.

(2) 3 C. P. Div. 264.

(3) L. R. 19 Eq. 473.

(4) L. R. 20 Eq. 632.

this sum of £79 15s. 9d. was charged, and he had no materials before him except, I presume, the receipts from the witnesses, proving that the money had been in part paid. I accordingly sent the case back to him, and asked him to reconsider it, and report to me. The Taxing Master has now sent in his report, in which he says:—"I annex the account of Sir Frederick Bramwell. Having examined these charges very carefully, and perused the two affidavits made by Sir Frederick Bramwell, filed, respectively, the 19th January 1889, and 4th March 1889, and considering the nature of the questions upon which he had to give expert evidence, I cannot see my way to make any reduction in his account as annexed." In other words, "I certify now for the whole seventy-five guineas." He refers to Rule 8 of Order X., of the Rules of April, 1878, which gives the Taxing Masters power to allow whatever fees they consider reasonable for the procuring of the evidence of witnesses; and the report goes on:—"It has been held in many cases that expert witnesses are to be allowed proper fees for qualifying themselves to give evidence, and it is not unusual to allow engineers and other scientific witnesses £10 10s. a day for giving evidence in cases taxed as between party and party; and for qualifying themselves to give evidence they are fairly entitled, in my judgment, to larger fees. Sir Frederick Bramwell has charged £15 15s. per day (of six hours) for his own time qualifying and giving evidence." It will be observed that the Taxing Master has omitted to notice, though he still allows, the charge of £18 18s. for Sir Frederick Bramwell's assistants, which makes up part of the £79 15s. 9d., as appears from the account annexed to the report. No explanation of this charge was before him, or is shown to me, and it must be disallowed. The Taxing Master has allowed a fee of £8 8s. per day to Mr. Imray, a gentleman of admittedly high professional standing; and that affords a measure of what he considered an adequate fee to allow to another scientific witness. In *Smith v. Buller* (1) £7 7s. a day for two days was allowed for this class of work. On this point there is an analogy in the practice of the Courts, in respect of counsel's fees.

It is a rule that a special fee to eminent Queen's counsel may properly be allowed on taxation of costs as between solicitor and

(1) L. R. 19 Eq. 473.

M. R.
1890.

Ante, p. 181.

client, but as between party and party the rule is different. In that case the smallest fee paid to any one Queen's counsel is the measure of what is chargeable, and anything over and above such sum is a special fee which cannot be allowed. This point was decided by the Court of Common Pleas on a taxation appeal in the matter of the Armagh Election Petition. I think that the same principle may very fairly, as a general rule, be applied to scientific witnesses, and the allowance of such very special fee must be regarded as not a necessity, but a luxury, of litigation. No instance has ever come under my notice in which £15 15s. a day has been allowed for a witness's expenses as between party and party, and I do not agree with the Taxing Master that a higher rate should be allowed for the witness's time in his study than for his evidence in Court. In this very case it appears that Sir F. Bramwell at an earlier stage made another affidavit, the cost of which the defendant had to bear, and though the preliminary investigation requisite for that affidavit must have been nearly if not quite as troublesome, the Taxing Master reduced the charge very considerably, and allowed a sum very much less in proportion than that which he has sanctioned now. I shall, accordingly, send the bill back to the Taxing Master, with an intimation that £15 15s. per day is too large a fee to allow, and that in fixing a proper rate he should have regard to the rates of payment allowed to Mr. Imray, and also to his own former rulings in reference to Sir F. Bramwell's first affidavit. The unexplained charge of £18 18s. for Sir Frederick Bramwell's assistants must be disallowed.

Solicitor for the plaintiff: *Mr. Littledale.*

Solicitors for the defendant: *Messrs. Hardman & Son.*

In re SMITH, PINSENT & CO.

(By permission, from 44 Ch. D. 303; s. c. 38 W. R. 685, 59 L. J. Ch. 590.)

Practice—Costs—Taxation—Attempted ineffectual Sale of Real Estate—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), Rule 2 (c), Schedule I., Part I., Rule 2, Schedule II.

The costs of an attempted ineffectual sale of property, when there is no probability of the sale being effected for some years to come, should be taxed under Rule 2 (c) of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.

ADJOURNED SUMMONS.—This was a summons taken out by a firm of solicitors to review a taxation.

The solicitors were employed in April, 1886, by the trustees and executors of Caroline Brindley, deceased, and were directed by them to take the necessary steps to sell the estates devised by the will of the testatrix, and accordingly the estates were, on the 6th of August, 1886, put up for sale by public auction in fourteen lots; but at that sale only one small lot was sold, the others being withdrawn or no bidding made.

The solicitors having sent in their bill of costs, made out under Schedule II. of the Solicitors' Remuneration Act, 1881, in relation to proving the will of the testatrix and other matters connected with the estate and the realization thereof, and the trusts of the will, including the fees and disbursements in connection with the above-mentioned abortive sale by auction, the trustees at the suggestion of the solicitors on the 7th of February, 1889, obtained the common order to tax.

The Taxing Master only allowed the scale charge for the lot actually sold, and disallowed the costs and disbursements connected with the attempted sale of the remaining lots.

The solicitors carried in their objections to the taxation, from which it appeared that on the 14th of June, 1889, the solicitors, acting on the instructions of the trustees, caused the unsold part of the estates to be again put up for sale in eleven lots, and at that sale only one lot was sold, all the others being either withdrawn or no bidding made, and that it was felt to be most desirable for the

Chirby, J.
1890.

interests of the estate that no further attempt to sell the same should be made for, at any rate, some considerable time, so as to afford a chance of an improvement in the value of property, and that there was no intention or prospect of any further sale being attempted for some time to come.

The Taxing Master refused to allow the objections giving the following reasons:—"I have considered the above objections and disallow the same. I have allowed in the bill of costs taxed by me the scale charge for the lot sold at the auction.

"There is provision in the Solicitors' Remuneration Act, 1881, for the allowance of scale charges when property is not sold at the auction, but sold subsequently. To allow the items objected to according to Schedule II. might give the solicitor twice or thrice the amount he would be entitled to under the scale if the property had been sold. It could not have been intended to give more for doing half the work than the amount would have been if the business had been completed. The solicitor will receive at a subsequent period the scale charge when the property is disposed of, and in addition the charges provided for under Rule 2" (meaning the Rule 2 of Schedule I., Part I.)

It appeared that under an order made by Mr. Justice North the trustees had liberty to raise, and had raised by mortgage, the sum required for the present purposes of the estate.

R. F. Norton, for the applicants:—

The solicitors in this case have not completed the whole of the work, and they are entitled to have their bill taxed under Rule 2 (c) of the General Order under which the remuneration is to be regulated according to the present system as altered by Schedule II.

Ante, p. 329.

The decision of Mr. Justice Kay in *In re Dean* (1) is in our favour, as there he decided that the costs of solicitors who had acted in an abortive sale, the subsequent sale having been carried out by other solicitors, must be dealt with under Rule 2 (c), as it was clear they would not act on a future sale. In this case, although there is no such certainty, yet it is clear that under any circumstances they will not act probably for many years to come, and it is an obvious injustice that they should be paid nothing till they do act.

(1) 32 Ch. D. 203.

If years hence the same solicitors do act in a successful sale, they will be allowed costs on the principle laid down in *In re Dean* (1), <sup>*Chitty, J.*
1890.</sup> and what they are allowed now will have to be deducted from the scale charge. *Ante*, p. 329.

CHITTY, J. :—

As the money required has been raised by mortgage, it is unlikely that the property will again be put up for sale for some years to come. The solicitors are not bound to wait to be paid for their services in respect of the abortive sale which has already occurred, and the matter must be remitted to the Taxing Master to tax the items disallowed in accordance with Rule 2 (c) of the General Order.

If the same solicitors are employed at a future time to conduct the sale which is successful, they will not be paid twice over, but on a *quantum meruit* basis, and not on the scale charge; if, however, they ask to be paid on the scale charge, they will have to bring into account what they have already received. The costs of this application will be costs in the taxation.

Solicitors: *Field, Roscoe & Co.*, for *Smith, Pinsent & Co.*, Birmingham.

Monroe, J. *In the Matter of the* ESTATE of MARGARET ROACHE,
 1890. Owner; *Ex parte* JOHN M'GRATH and OTHERS, Peti-
 March 31. tioners.

(By permission, from 25 L. R. Ir. 256.)

Advertisements—Scale of charges—Printing.

The scale of charges for printing newspaper advertisements is at the uniform rate of 6*d.* per line, and the scale given in Madden's Land Judge's Practice (3rd edition), p. 470, is repealed.

MOTION to review taxation of costs.

The Schedule of fees in the Land Judge's Court (1) allows 6*d.* a line for the first insertion, 5*d.* a line for the second, and 4*d.* a line for the third. This schedule was fixed in about 1875. On the 27th June, 1889, seven principal Dublin papers (daily and weekly) resolved to charge at the rate of 6*d.* a line for single column, and in consequence of this resolution the *Freeman's Journal* declined to receive a payment in this case made in pursuance of the schedule, and the matter being brought before the Taxing Master, he overruled the objections, "the amounts being charged in excess of the allowance for advertising ascertained by the schedule of fees sanctioned by the Court, the items allowed being the proper amounts calculated according to the authorized scale."

From this ruling the appeal was taken.

Mr. C. H. Meldon, Q.C., on behalf of the appellant:—

The question raised is one of principle, as to what scale payment for advertisements is to be made on in this Court. There is in this Court no General Order specifying any fixed scale, but a scale is given in Madden, which has been followed for some years. In 1851 Baron Richards and Judge Longfield allowed the *General Advertiser* special latitude in their charges, which were always larger than those of the daily papers. In 1873 the Judges and the proprietors of newspapers agreed upon the

(1) Madden's Land Judge's Practice, p. 470.

charges of 6*d.*, 5*d.*, and 4*d.* respectively for three insertions. In 1877 this Court became part of the Chancery Division; but though the charges for printing are fixed at 6*d.* by the other Judges of the Division, they remain at the old scale here. In June, 1889, the proprietors of the newspapers held a meeting, and agreed to refuse advertisements at less than 6*d.* a line, on the grounds that the circulation of the papers had vastly increased since 1873, that the value had therefore increased, that the type allowed of a better display, and that the scale of advertisement charges to the public had doubled, while the public pay cash, whereas in this Court the papers get nothing until sale. This is the first case that has arisen since that decision was arrived at, hence this appeal.

Monroe, J.
1890.

MONROE, J. :—

I have no hesitation in allowing the application. In 1873 the scale fixed was very possibly a reasonable one; but since then wages have risen, the circulations have increased, types have improved, and other circumstances warrant an increased scale of charges. The papers have to wait for payment until the estate is sold, and in the other Courts of the Chancery Division there is a fixed charge of 6*d.* a line. This Court has been a branch of that Division since 1877, and if 6*d.* is not refused in the other branches there is no reason why there should be a different scale here. I therefore authorize the Taxing Master to tax advertisements for the future at 6*d.* a line in all cases.

Solicitors for the appellant: *Messrs. Melton & Son.*

C. A.
1890.

In re PALMER.

North, J.
May 8.

(By permission, from 45 Ch. D. 291; s. c. 38 W. R. 673, 62 L. T. 778, 59 L. J. Ch. 575.)

C. A.
June 18.

Solicitor and Client—Mortgage—Agreement as to Costs—Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44) s. 1, sub-s. 3; s. 3, sub-ss. 1, 4—“Client”—Employment of Solicitor.

S., being desirous of borrowing money on mortgage, wrote to *P.*, a solicitor, a letter instructing him to raise £300 upon a specified security, and undertaking “to pay your costs (which I agree at £20, exclusive of money out of pocket) to be incurred in and about doing what is necessary for the purpose of these instructions.”

P. found a mortgagee and carried out the mortgage, acting on behalf of both the mortgagor and mortgagee, and retained out of the £300 £20 for costs of both parties, other than out of pocket costs.

S. then applied for an order directing *P.* to deliver a bill of all such fees, charges, and disbursements as he claimed or had deducted, and referring such bill when delivered to taxation:

Held, first, that *S.*, the mortgagor, was a “client,” and had employed *P.* as his solicitor, within the meaning of Section 1 of the Solicitors' Remuneration Act, 1881; secondly, that although the £20 was partly in respect of business in which the solicitor was acting on behalf of the mortgagee, the letter was an agreement for remuneration between client and solicitor within the 8th Section of the Act; and thirdly, that in the absence of evidence that the charge of £20 was either unfair or unreasonable it ought not to be referred for taxation.

APPEAL from Mr. Justice North.

On the 21st of January, 1884, Robert Slater, a journeyman butcher, being desirous of raising £300 on mortgage, wrote to Mr. W. B. Palmer, a solicitor, as follows:—“I hereby request and instruct you to raise for me the sum of £300 at 10 per cent. per annum on the security of all my estate and interest under the will and in the property of the late Thomas Symonds, deceased, and I hereby undertake to pay your costs (which I agree at £20, exclusive of money out of pocket) incurred, and to be incurred in and about doing what is necessary in your opinion for the purpose of carrying out these instructions.—R. SLATER, junior.”

Mr. Palmer found a mortgagee, and carried out the mortgage. In so doing he acted both for the mortgagor, Slater, and for the

mortgagee, and on completion he retained out of the £300 £20 for his costs on behalf of both parties, and £3 11s. for money out of pocket, and handed over the balance to Slater.

There were other transactions between Slater and Mr. Palmer, which do not call for a report; and in January, 1889, Slater took out a summons asking (*inter alia*), that Mr. Palmer might be ordered to deliver to him "a bill of all such fees, charges, and disbursements as he claimed to be due or paid, or as have been deducted by him from the said applicant, or out of his moneys," and asking also for a reference to the Taxing Master to tax the said bill when so delivered.

The Solicitors' Remuneration Act, 1881, in Section 1, sub-section 3, as to the word "client" enacts as follows:—

"Client" includes any person who, as a principal, or on behalf of another, or as trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements.

The same Act in Section 8 provides as follows:—

"Sub-section 1: With respect to any business to which the foregoing provisions of this Act relate" (previously defined to include "business connected with mortgages") "it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly."

"Sub-section 4: The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the Taxing Master or Officer of the Court may inquire into the facts, and certify the same to the Court;

North, J.
1890.

and if, upon such certificate, it shall appear to the Court or Judge that just cause has been shown either for cancelling the agreement, or for reducing the amount payable under the same, the Court or Judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the Court or Judge may seem fit."

The summons taken out by Slater was adjourned into Court, and was argued before Mr. Justice North on the 8th of May, 1890.

Cozens-Hardy, Q.C., and Farwell, for Slater :—

An agreement can be no bar to the right of a person to have a solicitor's bill of costs taxed, unless the agreement is one authorised by the Act.

The only agreements made lawful by the Act of 1881, section 8, sub-section 1, are agreements made between the solicitor and his client. The mortgagor, though he be liable to pay the mortgagee his costs, is not the client of the mortgagee's solicitors or a person for the time being liable to pay to the solicitors their costs—that is to say, the applicants did not act as the clients of the respondent only in signing the agreements, according to the definition of "client" given by section 1, sub-section 3, of the Act: *Hester v. Hester* (1) following *In re Allen* (2), where it was held that a lessee bound to pay costs of a lessor's solicitor was not the client of the lessor's solicitor.

These are agreements that ought to be set aside on the ground of undue pressure and unreasonableness. By section 8, sub-section 4, if under any order for taxation of costs such agreement is relied upon, and it is objected to as unfair or unreasonable, the agreement may be impeached. The Court will make an order for taxation in order to give the Taxing Master jurisdiction; unless the Court will make an order for taxation for the purpose, the latter part of the section is nugatory.

Dunham, for Palmer :—

The agreements were made between "solicitor and client" within the meaning of the 8th section of the Act. The definition clause is

(1) 34 Ch. D. 607.

(2) 34 Ch. D. 433.

not exhaustive; but, supposing it were exhaustive, there is nothing to prevent a client including in an agreement costs for which he is not primarily liable; but when these agreements are looked at, they are not only agreements between the mortgagor and his client, but they amount to a retainer and agreement on behalf of the proposed mortgagee, in case he chooses to adopt them. The mortgagees did adopt these agreements, for they could not otherwise have been carried out.

If an agreement between solicitor and client coming within the Act is to be impeached, it can be only impeached on the same grounds and in the same way as any other agreement, unless for some reason there is an existing order to tax, and it is relied on in taxation. There is no order to tax, and the Court has no jurisdiction to make one simply for the purpose of giving the Master jurisdiction. If the Court were to assume such jurisdiction, it would amount to holding that there was a summary jurisdiction to impeach the agreement in all cases, and the first part of section 8 would be nugatory.

Cozens-Hardy, in reply.

NORTH, J. :—

The first point raised upon the agreement is that such an agreement is valid only so far as it is authorised by Act of Parliament; that it must be made between solicitor and client to come within the Act at all. Section 8, sub-section 1, of the Solicitors' Remuneration Act, 1881, enables a client to make an agreement with his solicitor for the remuneration of the solicitor either by a gross sum, or by commission, or by salary, or otherwise. The point raised is that the person who signed the agreement for remuneration by a gross sum was the mortgagor, and the remuneration which was being provided for comprised both mortgagor's and mortgagee's costs, and in respect of the mortgagee's costs the person making the agreement was not the client of the solicitor within the meaning of the Act. The interpretation clause says "client" includes any person who, as a principal, or on behalf of another, or as a trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or

North, J.
1890.

employ, a solicitor, and any person for the time being liable to pay a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements. It is said that here the mortgagor did not employ the solicitor so far as he acted as mortgagee's solicitor, and that in the next place he was not a person liable to pay the solicitor, because his liability was to refund to the mortgagee what costs the latter had to pay to his solicitor.

I do not take that view. In my opinion the documents amount to an instruction to or retainer of the solicitors to act not only for the mortgagor but for the mortgagee. No doubt what the documents provide for is payment of the costs of both parties, and it is said that the mortgagor had no authority to give instructions for the solicitor to act for the mortgagee. It is quite true the whole thing might have become abortive if the mortgagee had thought fit not to adopt it; but the authority was evidently given on the assumption that the mortgagee would accede to it. And if that state of things did take place, the mortgagee's costs would be included, and I cannot look on that document as anything but an agreement between a solicitor and his client within the meaning of the Act.

In the next place, it is said that the applicant has a right to have the costs taxed, notwithstanding the agreement; and for that reliance is placed on sect. 8, sub-sect. 4 of the Act. The first part of that sub-section provides:—"The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." If it stopped there it would simply show that such agreement might be specifically enforced if the subject of specific performance, or, if for a lump sum, might be the subject of an action for a liquidated demand; the Act says that the fact that it is made between solicitor and client is not to make any difference. Then the section goes on not to modify what has gone before, but to add something additional. It says, "If, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the Taxing Master or Officer of the Court may inquire into the facts, and certify the same to the Court." That does not seem to me to relate to any case except where there is an order for

taxation in existence. In the present case there is not any order for taxation, and the matter cannot go before the Taxing Master unless I made an order for that purpose. I do not think the Section empowers me to make such an order. It provides for the case where there is a taxation; then if such agreement were set up except for this provision the Taxing Master would have no authority. The matter would be concluded unless power were given to him by this sub-section.

Slater appealed. The appeal was heard on the 18th of June, 1890.

Farwell (*Cozens-Hardy, Q.C.*, with him) for the appellant :—

The letter which the appellant wrote to the solicitor is not an agreement within the meaning of the Solicitors' Remuneration Act, 1881. The 8th section of that Act empowers a solicitor to do what was previously unlawful, *i.e.*, "to make an agreement with his client" as to the amount and form of his remuneration. But although it is the practice for a mortgagor to pay the costs of his mortgagee, he is not the agent of the mortgagee for the purpose of retaining a solicitor on his behalf, and could not do so; and as he cannot be said to have "power express or implied to retain or employ" a solicitor for the mortgagor, he is not the "client" of the mortgagor's solicitor, within the definition contained in sect. 1., sub-sect. 3, of the Act. Consequently there could be no valid agreement between Slater and Mr. Palmer as to a sum which included the mortgagor's costs as well as his own.

[*FRY, L.J.* :—Sub-sect. 3 of sect. 1, is not a definition clause; it merely says that a "client" in that Act "includes," and so on. In other respects it leaves the expression "client" where it was.

COTTON, L.J. :—"Client" means everybody who employs a solicitor.]

Secondly, assuming the agreement to have been valid, then, under the 4th sub-sect. of sect. 8, if under any taxation of costs the agreement "relied upon by the solicitor shall be objected to by the client as unfair or unreasonable the Taxing Master may inquire into the facts." So that the existence of such an agreement does not prevent taxation, and if it is unfair or unreasonable, it may be

C. A.
1890.

referred to the Taxing Master, and the agreement may be "impeached and set aside," or the amount agreed upon may be reduced: *In re Gray* (1), *In re Inderwick* (2). The agreement here is clearly unreasonable, for according to the scale the charges should have been less than half the amount agreed; and there should be a reference to the Taxing Master to tax these costs, accompanied by directions that in taxing them he should have regard to the agreement: *In re Park* (3). The Court has jurisdiction over its own officer, and agreements entered into by solicitors with clients in humble life, who are practically at their mercy, will be jealously looked at by the Court.

Dunham, for Mr. Palmer, was not called upon.

COTTON, L.J. :—

Two points have been raised, and very ingeniously argued, but, in my opinion, neither of them can succeed.

First, it has been said that this was not an agreement within the Solicitors' Remuneration Act, 1881, on the ground that Mr. Palmer and Mr. Slater did not stand in the relation of solicitor and client. I think the construction of the third sub-division of the 1st section of the Act is against that contention. According to the definition contained in that sub-section, "client" includes any person who has power express or implied to retain or employ, and retains or employs, a solicitor. To my mind, Mr. Slater had the power to retain or employ Mr. Palmer, and has clearly done so. It is very true the remuneration which Mr. Palmer has retained was partly in respect of matters in which, strictly speaking, he was not engaged as solicitor for Mr. Slater, but he was engaged to do business for him as solicitor; and, in my opinion, the relation of solicitor and client was created between him and Mr. Slater within the meaning of this clause.

Then it is said that, having regard to the 4th sub-section of the 8th section, this agreement ought to be referred to the Taxing Master. But the appellant has not brought forward any evidence shewing that this charge is unfair or unreasonable; and although

(1) 30 Sol. J. 551.

(2) 25 Ch. D. 279, 282.

(3) 41 Ch. D. 326.

C. A.
1890.

the 4th sub-section does, in my opinion, give the Court power, where an agreement is so impeached, to refer it to the Taxing Master to consider whether the charge is fair and reasonable, no foundation for such an order has been made. Mr. Farwell has argued that this is a very unreasonable charge; but I do not think that he says it is unfair. I consider, however, that the Court ought not, merely upon such an argument by counsel, unsupported by affidavit or facts which will lead to that conclusion, to refer such an agreement to the Taxing Master to exercise the power given by the 4th sub-division of the 8th section.

In my opinion the appeal fails.

BOWEN, L.J.:—

I am of the same opinion, and I agree entirely with what the Lord Justice has said.

FRY, L.J.:—

I am of the same opinion.

Solicitors: *G. B. Crook; W. B. Palmer.*

In re ROBSON.

North, J.
1890.

(*By permission, from 45 Ch. D. 71; s. c. 38 W. R. 556, 63 L. T. 372, 59 L. J. Ch. 627.*)

May 10, 14.

Solicitor—Costs—Taxation—Scale Fee—Lease in consideration of Rent and Premium—General Order under Solicitors' Remuneration Act, 1881, Schedule I., Part II., rr. 1, 5.

When a lease is granted in consideration partly of a premium and partly of a rent, the lessor's solicitor is under Rule 5 in Part II. of Schedule I. to the Solicitors' Remuneration Order, 1882, entitled to the scale fee mentioned in that rule in respect of the premium, even though no abstract of the lessor's title to the property has been furnished to the lessee.

SUMMONS by a solicitor to review a taxation of costs.

Mr. J. E. Robson acted as solicitor for the lessor in respect of a lease of some property to the respondents to the summons. There

North, J.
1890.

being no agreement to the contrary, the costs of the lease were payable by the lessees. The lease was for a term of ninety years from the 29th of September, 1883, at an annual rent of £50, and the further consideration of a premium of £4,400 to be paid by the lessees to the lessor. The lessees were not entitled to call for the lessor's title to the property. The solicitor delivered to the lessees a bill of costs amounting to £59 10s. This account was made up of £14, the scale fee under the Solicitors' Remuneration Order of August, 1882, corresponding to the rent; £42, the scale fee under the same Order, corresponding to the amount of the premium, and £3 10s. for disbursements. The bill was referred for taxation, and the Taxing Master disallowed the £42, but he gave the solicitor an opportunity of bringing in an additional bill of costs under the old system, as altered by Schedule II. to the Remuneration Order. The Taxing Master was of opinion that, there having been no deduction of title to the property, Rule 5 of the Rules applicable to Part II. of Schedule I. to the Remuneration Order did not authorise the charge of a scale fee in respect of the premium for the lease.

Vernon R. Smith, for the solicitor:—

Rule 5 clearly contemplates that, whenever a lease is granted in consideration partly of a premium and partly of a rent, the lessor's solicitor shall be remunerated in proportion to the amount of the premium as well as in proportion to the amount of the rent. If the Taxing Master's construction of the rules is right, the result will be that, if a lease is granted in consideration of a rent of £1 and a premium of £10,000, the solicitor will practically have no remuneration at all. This cannot have been intended.

[He was stopped by the Court.]

Swinfen Eady, for the lessees:—

The question is, whether the solicitor is entitled to be paid for work which he has not done. There has been no deduction of title or preparation of abstract. If there had been a purchase at a price equal to the premium, the vendor's solicitor would not have been entitled to the scale fee mentioned in Part I. of Schedule I., unless he had done all the work for which the fee is prescribed—that is,

unless he had deduced the title to the property and perused and completed the conveyance. That is the effect of the decision of the Court of Appeal in *In re Lacey & Son* (1). The principle of that decision applies to the provisions relating to the remuneration for leases. In both scales the solicitor's remuneration is based on the annual rent, and in both the fee includes only "preparing, settling, and completing lease and counterpart." If the solicitor is not otherwise paid for furnishing an abstract of title, then Rule 1 applies, and he is to be remunerated under Schedule II. If the lease is granted partly in consideration of a premium, then Rule 5 applies, and, if an abstract of title is furnished, the solicitor is to be remunerated by a scale fee in respect of the premium, as in the case of a purchase at a price equal to the premium; but the scale fee is not payable if an abstract is not furnished. Under both scales the solicitor is not entitled to anything beyond the scale fee in respect of the rent, unless he does the work of preparing and furnishing an abstract. On any other construction the solicitor would be either paid twice over for work which he had done, or paid for work which he had not done at all.

North, J.
1890.

Ante, p. 238.

Vernon R. Smith, in reply :—

May 14.

Lord Justice Lindley, in *In re Field* (2) said (referring to Rule 5), "we find that if a lease is granted for a premium the purchase scale applies to the premium." The Taxing Master, in allowing the solicitor to send in an additional bill under Schedule II., is really allowing him to charge over again for work for which he has been already in part paid by the scale fee in respect of the rent—that is, for "preparing, settling, and completing lease and counterpart."

Ante, p. 278,
286.

NORTH, J. (after stating the facts as above, continued) :—

The Taxing Master has arrived at his conclusion as the result of the provisions in the 2nd part of Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, which fixes two scales of charges, the first being that of charges payable to a "lessor's solicitor for preparing, settling, and completing lease and counterpart" in cases of lease or agreement for lease at rackrent (not including mining or building leases); and the second that of charges

(1) 25 Ch. D. 301.

(2) 29 Ch. D. 608, 616.

North, J.
1890.

payable to a "vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart," in cases of conveyances in fee or for any other freehold estate reserving rent; or building leases reserving rent; or other long leases not at rackrent (except mining leases); and it is the latter scale, if either, which applies in the present case. Then the fifth of the rules applicable to Part II. provides, "where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." The Taxing Master has allowed the sum of £14 as the fee according to the scale on the rent, but has not allowed the £42 the scale fee claimed upon the premium. His view is, that any such scale fee must be a sum equal to the remuneration on a purchase at a price equal to the premium—viz., in the present case, £4,400; but that, as the solicitor would not, if this were a purchase at that sum, be entitled to any scale fee, because he has not negotiated or conducted the sale, nor deduced any title to the property, he, therefore, does not come within the provisions of Part I. of the first schedule, and there is no scale fee applicable to the case. He has held, however, that, although the solicitor is not entitled to any scale fee on the premium, he is entitled, in addition to a scale fee on the rent, to the remuneration prescribed by the Act in respect of business, the remuneration for which is not prescribed in Schedule I.—viz., remuneration according to the old system as altered by the second schedule—and he gave the solicitor an opportunity of bringing in a bill of costs to be taxed upon that footing. The solicitor, however, has not adopted that course, but insists that he is entitled to be allowed the £42, the scale fee on the premium. In giving to the solicitor this option of bringing in a bill the Taxing Master was, in my opinion, clearly wrong. Supposing the solicitor had, as he was invited to do, brought in a proper bill under the old system, it would have contained full charges for all work done, and the Master must have allowed the whole of it, for he would have had no power, under the new or old or any system, to have allowed such sum only in respect of that bill as bore to the total amount of the bill the same proportion that £4,400 bore to

the value of the whole consideration of the lease—*i.e.*, the premium *plus* the rent. In this case, therefore, the solicitor would have got his full bill of costs under the old system as altered by Schedule II., and would have received in addition a scale fee calculated on the rent. This view of the case seems to me clearly inadmissible. A solicitor must, in my opinion, be paid either according to the scale, or, independently of the scale, according to the old system as altered by Schedule II., and cannot in respect of one and the same piece of business be entitled to receive a compound remuneration made up in part of a scale charge and in part of a bill of costs in addition for professional work as distinguished from disbursements. This is not authorised by the Act or order or rules, except expressly in one particular case hereinafter referred to, and it would be to some extent giving double remuneration for the same work. This was also, I think, the view of Mr. Justice Chitty in *In re Hickley & Steward* (1). *Ante*, p. 270. The question then is, whether the solicitor is to be paid (*a*) by a scale charge on the rent and on the premium, or (*b*) by a bill of costs according to the old system as altered by Schedule II. The case falls exactly within Rule 5 of Part II. of the schedule—*viz.*, the lease is partly in consideration of a rent and partly of a money payment or premium. That rule provides that, “in addition to the remuneration hereby prescribed in respect of rent there shall be paid,” not a bill of costs, but “a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.” It does not say that the vendor’s or lessor’s solicitor is to be remunerated as if, to this extent, the transaction was a purchase, but that he is to be remunerated in the case of a lease or conveyance reserving rent by a sum equal to the remuneration on a purchase—a sum to be ascertained by reference to something else in the rules, to which reference effect must be given if possible. As we are dealing with the case of vendor’s or lessor’s solicitor, the rule would have been more happily expressed and more accurate if it had referred to remuneration on a sale instead of on a purchase, but the meaning is obvious.

Now, to what is reference here made? Remuneration on sales is given by Part I. of Sched. I. to vendors’ solicitors for three things—(1) negotiating a sale by private contract; (2) conducting

(1) 33 W. R. 320.

North, J.
1890.

Ante, p. 278.

Ante, p. 238.

Ante, p. 483.

a sale by public auction ; and (3) deducing title to property and perusing and completing conveyance. The first of these cannot be intended ; for it is well settled by *In re Field* (1), and later cases, that no charge can be allowed for negotiations in business coming within Part II. of Sched. I. ; nor can the second be meant, for there is very little connection between sales by auction and the matters dealt with in Part II. The reference must, therefore, be to the remuneration payable to a vendor's solicitor for deducing title and perusing and completing conveyance. And it is said that, as the scale fee on a purchase (or sale) is not payable unless the title is deduced as well as the conveyance completed (see *In re Lacey & Son* (2), *Newbould v. Bailward* (3)), so it cannot be allowed on a lease when the business is completed without deducing title. But it is clear that the two cases are not assimilated for all purposes. For instance, on a sale under Part I. a solicitor who negotiates a sale and deduces title and prepares conveyance receives separate fees for each, while a solicitor who negotiates a conveyance or lease coming under Part II. receives no fee for negotiating. Again, the law is established, that a lessee is not, in the absence of express contract to that effect, entitled to call for his lessor's title, and such title notoriously is scarcely ever required, and it would be rather absurd, I think, to hold that the reference in Rule 5 to remuneration in respect of the premium has relation only to the very rare cases of leases in which the lessor has by special contract to deduce his title ; and that far the larger number of cases in which leases are granted in consideration in part of a premium, without any title being deduced, are unprovided for by the rule. In fact, it is clear that the framers of the rules applicable to Part II. of Sched. I. had in mind that title is not ordinarily deduced on grants of leases, and that those rules are not confined to leases on the grant of which title is deduced ; for the first rule applicable to Part II. expressly provides that, if a vendor or lessor furnishes an abstract of title, it is to be charged for according to the existing system as altered by Sched. II., and this is the one case in which the Order allows remuneration by a bill of costs in addition to scale fees. It is obvious that this charge is in addition to and not in lieu of a scale fee ; for the rule merely allows a

(1) 29 Ch. D. 608.

(2) 25 Ch. D. 301.

(3) 14 App. Cas. 1.

separate charge for what is but a small part of the deducing of title; and it could not be intended that in cases where title is deduced the solicitor should not receive any remuneration for deducing title except the charge for the abstract. The provisions of rules 5 and 1, that the solicitor is to have a scale fee on the premium, and, if an abstract is furnished (which is part of the deduction of title), is to have something more, is, in my opinion, quite inconsistent with the contention that, if title is not deduced (*i.e.*, if an abstract is not furnished), he is not to have even any scale fee on the premium or other remuneration in respect thereof. If that were so, in the not uncommon case of a lease at a nominal or small rent and a large premium, no title being deduced, a solicitor would receive only a very moderate and possibly inadequate remuneration for his work—a state of things scarcely contemplated by the framers of the Act, Order, and Rules. In my opinion, the language of Rule 5, referring to a further sum equal to the remuneration on a purchase at a price equal to the premium, was intended to avoid the repetition of the table showing the rate or scale of remuneration, as though there had been a reference to it *mutatis mutandis*, and was not meant to narrow its application to cases precisely identical, or to exclude almost all leases at a premium from its operation. Under these circumstances, I have come to the conclusion that the solicitor is entitled to the £56 which he claims for remuneration; and the matter must go back to the Taxing Master to review his taxation. The solicitor must have his costs of this application.

Solicitors: *Mr. J. E. Robson ; Hasties.*

County Court.

KENNEDY v. BEAUMONT.

June, 1890.

(By permission, from 24 I. L. T. R. 95.)

(Before the RECORDER OF BELFAST).

Practice—Costs—Sale in Court—Solicitors' Remuneration Act, 1881, s. 2—General Order, April 16th, 1884—Discretion of Judge—General Order (1877) 10.

The General Order of April 16th, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, is applicable to proceedings in the County Court. Method of the taxation of costs on a sale of lands in the County Court defined.

THIS was a suit to raise the arrears of two annuities, which were charged on the inheritance. Under a decree for sale the lands were sold for £120. The Registrar taxed the plaintiff's costs upon the scale prescribed by the General Order of the 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881. From this taxation the plaintiff appealed to the Judge, on the ground that the costs should have been taxed according to the scale in use previously to the passing of the Act.

Whittaker, for the plaintiff, moved to vary the taxation.

Mr. A. Caruth, solicitor for the defendant.

The JUDGE :—

By the 2nd section of the Solicitors' Remuneration Act, 1881, the persons therein named were empowered to make such General Order as to them seemed fit, for regulating the remuneration of the Solicitors in respect of sales, &c. The 2nd section provides that, in framing the Order, regard may be had, among other considerations, to the amount of the capital money to which the business relates. By the General Order of the 16th of April, 1884, made in pursuance of the Act, it is provided by Clause 2a that the remuneration in respect of sales shall be as prescribed in Part I. of Schedule I., which gives the vendor's solicitor 40*s.* per £100 for

the first £1000, and rule 8 provides that where the remuneration amounts to less than £5 the remuneration shall be £5, except on transactions under £100, in which case the remuneration is to be £3. It was decided in *Stanford v. Roberts* (1), that the Act applies to sales in Court, but it has been contended on behalf of the plaintiff that the General Order does not apply to a proceeding in the Court, and that I ought to exercise the discretion vested in me by the 4th of the General Orders made under Part II. of the County Officers and Courts Act, 1877, by directing the costs to be taxed according to the scale in use previously to the passing of the Remuneration Act, on the ground that the purchase money upon sales in this Court is usually small. I cannot accede to this contention. The 10th of the General Orders of 1877 directs, in case of discretionary fees, the Taxing Officer shall take into consideration the amount or value of the subject of litigation and the general nature and circumstances of the particular case, which is quite in accordance with the principle of the Remuneration Act and the General Order made under it. If this had been a sale in the Superior Courts the Solicitors' remuneration would have been £5 in addition to his costs of suit and outlay. I cannot see any reason for confining the General Order to sales in the Superior Courts, but it is not necessary to consider this question, as I would not be justified in sanctioning under Order 4 any higher scale in this Court.

County Court.
1890.

Ante, p. 248.

No rule.

(1) 26 Ch. Div. 155.

M. R.
1890.

JESSOP v. CUSACK.

June 5.

(By permission, from 25 L. R. Ir. 244.)

Practice—Costs—Taxation of, between party and party—Settlement of interrogatories and affidavits by senior counsel—Subpœnas duces tecum—Instructions for brief—Documents—Refreshers—Third counsel in Court of Appeal—Report of judgment—Order VII. (Costs), Schedule 75a—Order X. (Costs), Rules 1, 12.

1. In an exceptional case a fee to senior counsel for settling interrogatories and affidavits may be allowed.

2. When *subpœnas duces tecum* have been directed by counsel, and are necessary, to enforce the production of documents, they should be allowed.

3. Item 75a applies to a brief in the Court below as well as in the Court of Appeal; but what should be allowed for such brief, and for briefing documents, is a matter for the Taxing Master.

4. Refreshers of £8 8s. to senior, and £5 5s. to junior counsel allowed in an exceptional case.

5. In the Court of Appeal, as a general rule, the costs (a) of briefing the report of the judgment of the Court below should be allowed, and (b) the costs of a third counsel when three counsel have been allowed in the Court below.

SUMMONS by the defendant to review taxation.

This was an application on behalf of the defendant for an order that the Taxing Master might be directed to review his taxation of certain items of the costs of the plaintiffs, under the judgment dated the 31st July, 1889, and also under the order of the Court of Appeal, dated the 3rd February, 1890.

The action was brought against the defendant, who was a solicitor, for an account, and for a declaration that he was liable for investments of the moneys of the plaintiffs, and resulted in a judgment for the plaintiffs, with costs, which was affirmed by the Court of Appeal, with costs.

The items referred to in the defendant's objections to the costs of the plaintiffs under the said judgment were as follows:—

- (a) Items 109–111. Fee to senior counsel for settling amended claim and interrogatories, with attendance, &c.

- (b) 172, added after. Fee to senior counsel for settling draft affidavits, with attendance.
- (c) 275-279. Fee on *subpœna duces tecum* for service on Mr. Maunsell; service of, and *viaticum*.
- (d) 280-283. Fee on *subpœna duces tecum* for service on defendant; service of, and *viaticum*.
- (e) 312. Instructions for brief on trial, £15 15s. charged and allowed. Defendant objects to portion of such allowance to the extent of £10 10s.
- (f) 315-336. Manuscript brief of documents, comprising 1,077 folios, the charge for same being £17 17s., in respect of which there has been allowed £12 7s. Defendant objects to so much of such allowance as has been made in respect of items 319-323 and 336, for 321 folios, amounting to £5 7s.
- (g) 385, and following. Portion of £8 8s. refresher fees to senior counsel; £3 3s. of this objected to. Portion of £5 5s. refresher fee to junior counsel; £2 2s. of this objected to.

The items in the costs allowed under the order of the Court of Appeal objected to were as follows:—

- (i.) Brief for counsel of report of judgment.
- (ii.) Brief to third counsel.
- (iii.) Amount of refreshers to counsel, the same fees being allowed as in the Court below.

The Taxing Master in his report stated as to—

- (a) That he did not take into consideration the settlement of the amended claim, and that he considered that interrogatories were “proceedings” within the meaning of Order X., Rule 12, and that he allowed the items, in the exercise of his discretion, as reasonable and just costs to be allowed. He referred to the certificate of counsel with respect thereto. As to—
- (b) He permitted these items to be added to the costs in accordance with the practice to allow items which have been omitted through oversight or inadvertence to be added to a party and party bill of costs. He allowed the items in the exercise of his discretion, under Order X., Rules 1 and 12, in case the

M. R.
1890.

Court thought that he was warranted in permitting the addition thereof. He ruled against the contention that the fee to senior counsel was a "separate fee" within the meaning of Order X., Rule 12.

Ante, p. 254.

- (c), (d). He allowed the costs as to the *subpœnas*, having regard to the counsel's directions and *Heffernan v. Vaughan* (1).
- (e) He reduced the item to £8 8s. It was objected that only £5 5s. should be allowed, and that the words in item 75a in the Schedule of Fees (Ledwich on Costs, p. 70): "When witnesses are to be examined or cross-examined," applied to the allowance "for such brief" in the same item; but he ruled that these words had reference only to the "brief on the hearing of an appeal," and not to brief on hearing or trial of action.
- (f) The Taxing Master, under the circumstances of the case, allowed these items, as he thought it was necessary that the deeds and documents should be briefed, being set forth in the schedule of evidence annexed to the judgment, and the plaintiffs having been put upon proof of them by the defendant.
- (g) He allowed the refreshers of eight and five guineas, having regard to the difficulty and complication of the questions involved in the case, and the importance of the result of it.

As to the costs in the Court of Appeal, he allowed—

- (i.) The charge for briefing the judgment, on the ground that it was necessary and proper that briefs of the report should be furnished to counsel. It was admitted that the report was called for, used, and referred to by the Court of Appeal on the hearing, and the plaintiffs and the defendant paid the charges for it moiety.
- (ii.) Three counsel having been allowed in the Court below without objection, he thought, having regard to the difficulty and importance of the case, three counsel should be allowed in the Court of Appeal.
- (iii.) That the solicitor for the plaintiff was right in marking the same fees for refreshers as in the Court below.

Mr. Price, Q.C., for the defendant:—

M. R.
1890.

These costs should not be allowed between party and party : *Dyott v. Reade* (1); (a) and (b), the interrogatories and affidavits *Ante*, p. 157. had already been settled by junior counsel; (c) and (d), the *subpœnas duces tecum* were unnecessary. *Heffernan v. Vaughan* (2) *Ante*, p. 254. was a common law case, and related to evidence in chief. Here the defendant was bound to attend to be cross-examined on his affidavit. The *subpœna* to Mr. Maunsell was unnecessary caution on the part of senior counsel: he had made an affidavit. (e) Item 75a applies to both brief on hearing and on appeal. If the Taxing Master's view were correct he could only have allowed £1 11s. 6d.: see item 75. £5 5s. was enough to allow. (f) The defendant did not put the plaintiffs upon proof of the documents, he only referred to them for greater certainty when produced. [THE MASTER OF THE ROLLS: It would have amounted to insanity on the part of the solicitor to have allowed his counsel to go into Court without the documents.] I do not press this point. (g) The refreshers were too high: £5 5s. for senior, and £3 3s. for junior counsel was ample. This is an instance of the "luxury of payment:" *Dyott v. Reade* (3). There the Taxing Master allowed £5 5s. a day to senior counsel.

As to the costs of the appeal—(i.) it was not necessary to brief a report of the judgment in the Court below; (ii.) the costs of a third counsel should only be allowed in exceptional cases: *Robb v. Connor* (4); (iii.) the refreshers are objected to on the same ground as taken to those in the Court below.

The Right Hon. Samuel Walker, Q.C., for the plaintiffs, was not called upon.

THE MASTER OF THE ROLLS:—

I am of opinion that the Taxing Master was right as to each and every one of the items that have been objected to, or at any rate I have no materials before me from which I could come to the conclusion that he was wrong in respect of any of them. The first objection raised by Mr. Price was to items 109–111, the allowance

(1) 10 Ir. L. T. R. 110.

(2) 18 Ir. L. T. R. 38.

(3) 10 Ir. L. T. R. 110.

(4) Ir. R. 9 Eq. 373.

M. R.
1890.

Ante, p. 157.

of a fee to senior counsel for settling interrogatories which had already been prepared by junior counsel. I do not wish to lay down any general rule that interrogatories ought to be settled by senior counsel. In any ordinary simple case it would be improper for a solicitor to send them to senior counsel. I do not attach any importance to the fact that the interrogatories in this particular case were very materially modified by senior counsel. This was, however, a very exceptional and difficult case. I cannot say that there was anything in the course pursued by the solicitor for the plaintiffs that could be said to be indulging in "the luxury of payment," as it was called by my predecessor in *Dyott v. Reade* (1). The Taxing Master has certified that it was reasonable to have these interrogatories settled by senior counsel. I am not prepared to say that he was wrong, unless I am to lay down a rule that under no circumstances should interrogatories be settled by senior counsel. Mr. Price says that there was a change of senior counsel. If I thought that the interrogatories had been sent to a new senior counsel, although they would not have been sent to the original senior counsel, I should look at the matter in a different light; but I do not find that anything of that kind was done here. A great deal depended on the interrogatories in this case, and I am not aware of any general rule which ought to induce me to hold that the Taxing Master was wrong.

The next item objected to (No. 172) allowance of a fee for the settlement of affidavits by senior counsel depends on the same principle. Mr. Price, with his great experience, cannot say that there is any rule against submitting affidavits to senior counsel; and in this case it was clearly proper to do so. Items 275-9, and 280-3, relate to *subpœnas duces tecum*. One of these was to Mr. Maunsell; he attended here in Court in obedience to the *subpœna duces tecum*. I think that the plaintiff was bound to take proper steps to enforce the production of documents by *subpœna duces tecum*. It was directed by counsel in advising proofs, and I am of opinion that it was rightly so directed. No objection has been taken to the amount of these items.

I had some doubt as to items 280-3, which relate to a *subpœna* to the defendant himself; but, on the whole, I am of opinion that it

(1) 10 Ir. L. T. R. 110.

would not have been prudent to trust to admissions as to the contents of documents, and that it was necessary to compel the defendant to attend in Court with the very documents themselves. So far as the *viaticum* is concerned, the defendant cannot object to that, as he has the money in his own pocket.

Item 312 is instructions for brief on trial; £15 15s. was charged, and £7 7s. was taken off by the Taxing Master. There is some obscurity in his reasons as stated in his report. If they were correct, he should only have allowed £1 11s. 6d., because after stating that he ultimately allowed £8 8s. in respect of this item, he says: "The defendant objected to a larger allowance than £5 5s., and contended that the words in item 75a, in the Schedule of Solicitors' Fees, page 70, Ledwich on Costs, 'when witnesses are to be examined or cross-examined,' applied to the allowance 'for such brief' in the same item; but I ruled that these words had reference only to the 'brief on the hearing of an appeal,' and not to 'brief on hearing or trial of action.'" His reasons are not correct, and, if they were, would render his conclusion erroneous. The rule applies to cases in the Court below as well as in the Court of Appeal. Mr. Price then says that £5 5s. would be enough to allow. I have no scale to measure the sufficiency of £5 5s. as compared with £8 8s. The Taxing Master is a responsible officer selected for his fitness to decide these matters, and I should feel almost bound to accept any figures that he arrived at, short of their being extravagant or manifestly excessive.

There was a great deal in the case outside the documents. I have looked at the brief, and I find that it was carefully prepared, and eminently necessary for the proper instruction of counsel.

Items 315-336 are brief documents of £12 7s. Mr. Price practically gave up this objection, as I have said in the course of his argument it would have amounted to insanity on the part of the solicitor for the plaintiff not to have briefed every scrap of the documents in this case.

The next items objected to 385, 388, 391, and following items down to 421, which deal with refreshers to counsel—£8 8s. to the two senior counsel, and £5 5s. to the junior counsel.

I think that the Taxing Master has taken a liberal view in allowing eight guineas to senior counsel and five guineas to junior

M. R.
1889.

Ante, p. 157.

counsel; but I am not aware of any authority binding me to hold that such fees should not be allowed as between party and party. I think it must depend on the magnitude of the case, as was said by Sir E. Sullivan, M.R., in *Dyott v. Reade* (1). The present case did not occupy so long a time as that one, but the defendant has the advantage of having a smaller number of refreshers to pay. It is a liberal allowance, but it was a very exceptional case, not only as to the amount of money involved in it, but also having regard to the questions of character that were at stake. Again, the case necessitated an uninterrupted attendance. No counsel engaged in it was absent from Court during any important part of it. It was necessary to give such a fee as would ensure the constant attendance of counsel, and the fee was not placed at this figure because of the prospect of succeeding against the defendant. I do not, therefore, differ from the Taxing Master on this point.

Accordingly, I am of opinion that all the costs in this Court that have been objected to are proper, and that the Taxing Master was right in the decision he arrived at. I say this wholly irrespective of the merits of the case.

The remaining objections are to costs in the Court of Appeal. The first question is as to a brief of the report of the judgment in the Court below being allowed. I am of opinion that it was absolutely necessary that the judgment of the Court below should have been briefed in this case; and I would add that in hardly any case can it be wrong or even unnecessary to brief the judgment of the Court below. It is one of the first things the Court of Appeal asks for. It is true that counsel gets a fee for attending to hear the judgment, and he should therefore be, to some extent, familiar with it; but I think, nevertheless, that his solicitor should put it before him in an authentic and complete form when the case is in the Court of Appeal, and I am disposed to say that counsel should have it in almost every case. The next question is as to the employment of a third counsel. If it was right to give him a brief, I am of opinion that the fees given to him were proper. If the Court of Appeal lays down a rule that a third counsel is not to be allowed, I must act upon it; but there is no such rule. It is very important in a heavy case that all the counsel that were engaged in it in the Court

(1) 10 Ir. L. T. R. 110.

below (not exceeding three in number), should be in the Court of Appeal; and it would require a very strong case to induce me to say that it would be wrong to allow a third counsel in the Court of Appeal when three had been allowed below, and the present was eminently a case in which three should be allowed. I am therefore of opinion that the Taxing Master's decision on every item that has been objected to was correct, and I dismiss this application with costs.

M. R.
1890.

Solicitor for the plaintiffs: *Mr. Purefoy Poe.*

Solicitors for the defendant: *Messrs. Dickinson & Cusack.*

In the Matter of THE DUBLIN (SOUTH) CITY MARKET
COMPANY; *Ex parte* KEATLEY.

M. R.
1890.

June 16.

(*By permission, from 25 L. R. Ir. 265.*)

Practice—Taxation of Costs—Lands Clauses Consolidation Act, 1845, Section 82—Costs of conveyance of outstanding interest.

A. had for more than twelve years been in possession of premises held under a lease for a life and term of years. The premises were taken by a Company, under the powers conferred by an Act with which the Lands Clauses Consolidation Act was incorporated. The Company required that administration should be taken out to B., the assignee of the lease, through whom A. claimed. C. accordingly took out administration to B., and conveyed her interest as administratrix in the premises to A.:

Held, that, under sect. 82 of the Lands Clauses Consolidation Act, the costs of this conveyance should be borne by the Company.

In re Liverpool Improvement Act (L. R. 5 Eq. 282) followed.

SUMMONS on behalf of the petitioner to review taxation.

This was an application on behalf of the petitioner in this matter to be allowed the sum of £7 19s. 2d., "costs of preparing deed and getting counsel to settle it, and registering said deed," which had been disallowed by the Taxing Master.

By a lease dated the 16th December, 1828, Alexander Major demised to Matthew Heyfron, his heirs, executors, administrators, and assigns, the house, No. 18 South Great George's-street, Dublin, to hold unto the said Matthew Heyfron, his heirs, executors, administrators, and assigns, from the 1st of November, 1828,

M. R.
1890.

for the life of Michael Heyfron, son of the said Matthew Heyfron, or for the term of sixty-one years from the said 1st November, at the yearly rent of £25. By deed of the 18th October, 1836, the said Matthew Heyfron assigned his interest in the said premises to Martin Heyfron. On the 16th December, 1836, Martin Heyfron, being in possession of the premises, died intestate, and after his death his widow, Ellen Heyfron, remained in possession, and entered into partnership in business with Thomas Keatley, the petitioner. By the terms of the partnership agreement it was provided that upon the death of either of the partners the premises, No. 18 South Great George's-street, should be the sole property of the survivor.

On the 17th January, 1868, Ellen Heyfron died intestate, leaving Thomas Keatley surviving. He remained in possession of the premises till possession was taken by the Company, under their compulsory powers, on the 31st May, 1881. It was not known whether Michael Heyfron, the life in the lease, was alive or dead.

Acting upon the advice of counsel the compensation money was paid into Court.

A copy of counsel's opinion was furnished to Thomas Keatley's solicitor, the material portion of which was as follows:—"The title shown by Thomas Keatley is defective. During the life of the *cestui que vie* the heir-at-law of Martin Heyfron would take, and on the death of the *cestui que vie* the personal representative of the tenant would then become entitled. So far as regards the freehold interest, the right of the heir is probably barred by the Statute of Limitations, but as regards the chattel interest the right of the personal representative of Martin Heyfron would not accrue until the death of the life in the lease. Nothing is shown to lead one to suppose that a title could even be claimed under the statute. No other title is shown; and as at best a title depending on the statute is not a satisfactory one for the Company, the money must be paid into Court. If the representatives of Heyfron could be found, and administration taken out to him, and the personal representative were to join, it would get over the difficulty so far as regards the chattel interest."

The copy opinion was accompanied by a letter from the solicitors for the Company, asking if the last clause in the opinion could be carried out.

In consequence of this letter, on the 6th January, 1882, letters of administration of the personal estate of the said Martin Heyfron were obtained by Elizabeth Heyfron, his daughter, and by an assignment of the 21st January, 1882, Elizabeth Heyfron assigned for a nominal consideration to Thomas Keatley all her interest as administratrix in the premises and in the fund lodged in Court by the Company. The Company subsequently executed a deed-poll pursuant to the statute, and on the 23rd April, 1883, a petition for payment out of the fund in Court was presented by Thomas Keatley.

By an order of the Master of the Rolls, dated the 1st March, 1887, made upon the said petition, and upon reading, amongst other documents, the assignment of the 21st January, 1882, the usual order for payment out of the fund in Court was made, and the petitioner was declared entitled to his costs of the petition, and order therein, and proceedings thereunder, together with all costs properly and necessarily incurred pursuant to the provisions of the Lands Clauses Act, 1845 (save certain costs not material to the present application), when taxed and ascertained.

Upon taxation of the costs under the order of the 1st March, 1887, the Taxing Master allowed the costs of taking out administration to Martin Heyfron, but disallowed the item above mentioned, being the costs of the assignment of the 21st January, 1882.

His ruling was as follows:—

“OVERRULE, on the ground that the deed was rendered necessary by reason of the petitioner having purchased the interest of Elizabeth Heyfron, administratrix of Martin Heyfron, deceased, in the funds in Court after petition was filed; and as there was a reference to Chambers to ascertain who was entitled to the funds, the said Elizabeth Heyfron would have been paid her share were it not for the purchase so made by the petitioner, and therefore the Company should not have to pay for the costs of this conveyance.”

Mr. Bewley, QC., in support of the summons:—

The Taxing Master has made a mistake of fact as well as of law, for the assignment was before the petition. The costs payable by the Company under Section 82 of the Lands Clauses Consolidation Act, 1845, include the expense of getting in any outstanding legal

M. R.
1890.

estate: Dart's Vendors (6th edition), pp. 802, 803. The case of *In re Liverpool Improvement Act* (1) there cited is directly in point: see also Woolf and Middleton on Compensation, p. 186. The fact that the Company has executed a deed-poll makes no difference: *In re Divers* (2).

Mr. Charles O'Connor, for the Company.

THE MASTER OF THE ROLLS:—

The ruling of the Taxing Master is, in my opinion, not correct, and the reasons given by him are founded on a mistake of fact. The deed, the costs of which have been refused, was executed before the petition was filed, and not after. Although the petitioner's title was quite good as a holding title, the execution of this deed was a formal link requisite for the completion of the title according to the opinion of the counsel for the Company. The Taxing Master has, I think properly, allowed the costs of taking out administration, which, if it had any effect, would *pro tanto* put the title out of the petitioner; but he has refused to allow the costs of the assignment from the administratrix, which was needed in order to bring it home to the petitioner. The case of *In re Liverpool Improvement Act* (3) appears to be in point, and shows that the costs of formally completing the title (which was in substance good before) should be borne by the Company, who required that step to be taken. I therefore direct that these costs be paid by the Company, together with the costs of this application.

Solicitor for the petitioner: *Mr. J. J. Adams*.

Solicitors for the Company: *Messrs. V. B. Dillon & Company*.

(1) L. R. 5 Eq. 282.

(2) 1 Jur. N. S. 995.

(3) L. R. 5 Eq. 282.

LYNCH v. MACAN. (No. 1.)

Ex. Div.
1890.

(1889. L. No. 264.)

June 18.

(By permission, from 26 L. R. Ir. 385; s.c. 24 Ir. L. T. R. 89.)

*Taxation of costs—Party and party—discovery of documents—Advice of counsel—
Further motion—Gen. Ord. X., R. 12, April, 1878.*

The costs of procuring the advice of counsel prior to the institution of a motion are not taxable as party and party costs of the motion.

Such costs are “preliminary to,” not “costs of,” the motion.

Semble, the word “proceedings” in Gen. Ord. X., R. 12 (April, 1878), means *direct* proceedings towards the judgment in the action, and does not include collateral proceedings, such as a motion.

ADJOURNED SUMMONS to review the taxation of the plaintiff’s costs of certain interlocutory proceedings.

An order was made, on the application of the plaintiff, that the defendant should make discovery on oath of the documents in his possession. The defendant filed an affidavit; and on the 25th March, 1890, another order was made, on the application of the plaintiff, that the defendant should within three days file a further and better affidavit, making discovery of certain documents referred to in the previous affidavit, and also that the defendant should pay the costs of the application when taxed.

On the 16th April, 1890, another order was made, on the application of the plaintiff, that the defendant should within a certain time produce for the inspection of the plaintiff certain letters disclosed in defendant’s affidavit of the 12th March, 1890, and that defendant be at liberty within three days from the date of the order to make a further affidavit of discovery, and that the defendant should pay the costs of the motion when taxed.

The plaintiff having lodged his two bills of costs of both said orders for taxation, the Taxing Master disallowed the following items in both bills:—

Ex. Div.
1890.

Order of 25th March.

The plaintiff having received the defendant's affidavit of discovery :—

	£	s.	d.
1. Instructions, to be advised by counsel as to the sufficiency thereof - - - -	0	6	8
2. Attending counsel - - - -	0	3	4
3. Paid fee - - - -	1	1	0

Order of 16th April.

Defendant having delivered a further affidavit of discovery of documents pursuant to the order of 25th March :—

	£	s.	d.
1. Instructions, to be advised by counsel thereon	0	6	8
2. Attending counsel - - - -	0	3	4
3. Paid fee - - - -	1	1	0

The plaintiff having lodged objections to the above taxation, the Taxing Master reported on both bills to the effect that the charges were for the advice of counsel prior to the institution of motions, and were not properly chargeable against a party, and he accordingly disallowed the objection.

The plaintiff then appealed.

Bushe, for the plaintiff, in support of the motion :—

The charges made for obtaining the advice of counsel as to the sufficiency of an affidavit of discovery of documents should be party and party costs. Many difficult and serious questions might arise on the sufficiency of such an affidavit, and that has been proved in this case by the fact that two subsequent orders were made compelling further discovery, the applications for which were in the first instance grounded on the advice of counsel. Therefore the entire proceedings from the receipt of the first affidavit to the obtaining of the orders should be considered as one. General Order X., Rule 12, of April, 1878, gives the Taxing Officer discretion to allow such costs as party and party costs.

Harrison, for the defendant :—

If the Taxing Officer has exercised a discretion the Court cannot interfere.

[PALLES, C.B. : Argue the case as if he had not exercised a discretion.]

Ex. Div.
1890.

These fees, if allowable at all on taxation, are only allowable as part of the costs of the action. The costs of an application or motion do not include preliminary expenses: General Order X., Rule 12, is the only rule under which they could be allowed, and it is not applicable to any costs but the general costs of the action.

PALLES, C.B. :—

I am inclined to think that the word “proceedings” in General Order X., Rule 12, means *direct* proceedings towards the judgment, the costs of which would, without special order, be taxed as part of the costs of the cause, and do not include collateral proceedings, such as a motion, the costs of which are given against a particular party, and are thereby severed from the general costs of the cause. It is not necessary expressly to decide that question here, as, however it may be, the costs given against the defendant were the costs of the motion only. I am clearly of opinion that such costs do not include the costs of procuring the advice of counsel to institute such motion. They are costs “preliminary to,” not “of” the motion.

ANDREWS and MURPHY, JJ., concurred.

Solicitor for the plaintiff: *P. A. Chance.*

Solicitor for the defendant: *R. W. Peebles.*

Ex. Div.
1890.

LYNCH v. MACAN. (No. 2.)

June 18.

(1889, L. No. 264.)

(By permission, from 26 L. R. Ir. 385, 24 Ir. L. T. R. 89.)

Taxation of costs—Party and party—Attachment—Advice of counsel.

The costs of procuring the advice of counsel to institute a motion to attach a person for contempt of Court are not taxable against such person as party and party costs.

ADJOURNED SUMMONS to review taxation of costs.

On the 19th February, 1890, whilst the action was still pending, an article appeared in the newspaper, *The Medical Press and Circular*, entitled "A Dublin Medical Cause Celebre," in which reference was distinctly made to the facts of the case, and there were also certain comments thereon. The same article was reprinted and published in the newspaper, *The Dublin Evening Mail*, of the same evening, with the introductory words, "*The Medical Press* to-day says." On the 26th February, 1890, counsel on behalf of the plaintiff applied *ex parte* for a conditional order to attach Dr. A. H. Jacob, the Dublin Correspondent of *The Medical Press and Circular*, and Mr. Tickell, the proprietor and publisher of *The Dublin Evening Mail*, for contempt of Court in publishing the said articles, as calculated to prejudice the fair trial of the action. The Lord Chief Baron said that it was not the practice in Ireland to make such an order *ex parte*. The application should be moved on notice, and he gave liberty to serve notice of motion for the 1st of March (1).

Notice of motion having been served, the application was heard on the 1st March, and the Court made an order adjudging Mr. Tickell and Dr. Jacob guilty of contempt of Court, and ordered them to pay the plaintiff's costs of the motion, when taxed.

The plaintiff subsequently lodged his bill of costs for taxation. The Taxing Master (Mr. S. Davis) proceeded to tax same, and disallowed or reduced (amongst others) the following items:—

(1) See General Order XLVIII., Rule 11.

	£	s.	d.	Ex. Div. 1890.
1. Attendance on plaintiff, when he called on his solicitor with copies of the newspapers containing the said articles, and called attention to same, and gave instructions to take the advice of counsel thereon, £1 1s., reduced to	0	6	8	
2. Instructions to counsel to advise accordingly -	0	6	8	
3. Attending counsel - - - - -	0	6	8	
4. Paid fee - - - - -	2	2	0	
19. Instructions to counsel to settle affidavit and notice of motion - - - - -	0	6	8	
20. Attending counsel - - - - -	0	3	4	
21. Paid fee - - - - -	2	2	0	
36. Attending Mr. Healy, to move <i>ex parte</i> for an attachment, 10s., reduced to - - -	0	6	8	
37. Attending him - - - - -	0	6	8	
38. Paid his fee - - - - -	2	2	0	
55. Docket of consultation for Mr. O'Shaughnessy, Q.C. - - - - -	0	3	4	
56. Attending him - - - - -	0	6	8	
57. Paid fee - - - - -	2	2	0	
58. Docket of consultation for Mr. Healy - - -	0	1	8	
59. Attending him - - - - -	0	6	8	
60. Paid fee - - - - -	2	2	0	
61. Attending consultation - - - - -	0	13	4	
62. Paid for room - - - - -	0	5	0	

The plaintiff having lodged objections to the above taxation, the Taxing Master reported as follows:—

I disallow these objections for the following reasons:—Item No. 1. I consider that 6s. 8d. is sufficient for instructions as against the party, and therefore I disallowed 14s. 4d.

Items 2, 3, and 4. I consider that charges for obtaining the advice of counsel preparatory to an application to the Court in an action are not taxable items against a party, and therefore I disallowed same.

Items 19, 20, and 21. I don't consider that the expense of counsel settling the affidavit here charged should be allowed as against a party.

Ex. Div.
1890.

Items 36, 37, and 38. I disallowed these items, inasmuch as no order was made, and no costs of the application awarded.

Items 55 to 62, inclusive. I disallowed the consultation, being of opinion that the case was not of sufficient importance to warrant such expense, as against a party in the action, and I considered that liberal fees were allowed to counsel on their briefs, particularly senior counsel.

Bushe, for the plaintiff, in support of the application :—

The costs of an attachment are in the discretion of the Court: *Abud v. Riches* (1.) Even if the proceedings for the attachment are in the nature of originating proceedings, like a new action, counsel's fee for advice should be allowed as party and party costs, and the Taxing Master has power to allow same: *Tisdall v. Richardson* (2). It is clear that the Taxing Master has a certain discretionary power; but in the present case he did not exercise that discretion. He seems to have erred in point of principle.

Ante, p. 395.

Hunt, for Mr. Tickell :—

The application against Mr. Tickell was altogether in the nature of an originating proceeding, just as if it were a new action. The costs of obtaining the advice of counsel as to bringing an action are not taxable costs, and, as the attachment proceedings are in their essence criminal, it is quite clear that such costs could in no view of the case be allowed. There is no precedent in the Taxing Office for allowing such items.

Ante, p. 343.

[Counsel referred to *Boswell v. Coaks* (3); *McNamara v. Malone* (4).]

PALLES, C.B. :—

I am of opinion that as regards Mr. Tickell the application for an attachment was an originating proceeding, although the jurisdiction was exercised in a cause, and that the charges incident to procuring the advice of counsel to institute that proceeding can no more be allowed than if the advice given had been to bring an action.

ANDREWS and MURPHY, JJ., concurred.

Solicitor for the plaintiff: *P. A. Chance.*

Solicitor for Mr. Tickell: *B. Eaton.*

(1) 2 Ch. Div. 528.
(2) 20 L. R. Ir. 199.

(3) 36 Ch. Div. 444.
(4) 18 L. R. Ir. 269.

GREGG v. JOHNSTON.

County Court,
1890.

(By permission, from 25 Ir. L. T. R. 20).

Oct., Nov.,

(Before the Recorder of Belfast.)

Civil Bill process—View Jury—34 & 35 Vict., c. 65, s. 38—Costs incidental not taxable against a defendant.

THE plaintiff issued a process against the defendant for the recovery of £50, for damages caused by (1) interference with ancient lights; (2) loss sustained by reason of flooding of premises of the plaintiff by wrongful acts of defendant, and (3) injury to roof of plaintiff's premises in construction of adjoining house by defendant. Plaintiff served usual notice for a jury.

Smith, for plaintiff, applied on notice for an order for a "view" jury in the case, relying on section 38 of the 34 & 35 Vict., c. 65, which provided "that a writ or claim of view should not be necessary or used," but that it "should be sufficient to obtain a rule of the Court or a Judge's order that a view should be had." The 3rd section declared that the term "Court" should include, amongst others, every Civil Bill Court, and the term "Judge" should include "every chairman of the Civil Bill Court." In this particular case it was deemed essential that the jury to try the matter in dispute should personally inspect the premises at Ballyclare.

Mr. McGonigal, solicitor for defendant, resisted the application, on the ground that the section relied on only applied to criminal cases, and that a view jury had never before been applied for or granted in a civil case in a County Court.

THE JUDGE.—The Act relied on seems to me to be general in its terms and to embrace all cases, civil as well as criminal, and, at the instance of the plaintiff, I will make the order asked for in the terms of the 38th section. I will say nothing now as to the costs of the application, and the expense attending the carrying out of this order must be borne in the first instance by the plaintiff.

Order accordingly.

County Court.
1890.

Subsequently the process was heard, and the plaintiff obtained a verdict for £5, and

Smith, for the plaintiff, applied that the costs of and incidental to the view jury should form part of plaintiff's costs against the defendant. The 34 & 35 Vict., c. 65, contained no provision as to such costs, but Order III. (1885) of the Superior Courts (quoted in *Dixon on Sheriffs*, pp. 453-7) did contain particulars of special fees applicable to such a case in the Superior Courts; and in the absence of any special provision for County Court procedure he submitted that such scale should be adopted in this Court.

Mr. McGonigal, solicitor for defendant, opposed the application.—The fact that even in the Superior Courts it required the passing of the special order referred to in order to make a losing party liable proved that without a similar order for the County Court his Honour had no jurisdiction to make the order now applied for.

The JUDGE.—I have no jurisdiction to make this order. The original Civil Bill Act specially provides that the only fee to be allowed or charged in a jury case is 3s. 6d., and in the face of that provision I am powerless, in the absence of any statutable or other authority, to include in the costs as against the defendant here any greater sum than the usual item of 3s. 6d., which will, in the usual way, form part of the costs of the decree obtained.

Motion refused.

Solicitor for plaintiff: *J. W. McNinch*.

Solicitor for defendant: *D. McGonigal*

In the Matter of the SOLICITORS' REMUNERATION ACT,
1881; *Ex parte CARUTH.*

M. R.
1890.

Nov. 24.
Dec. 1.

(*By permission, from 25 L. R. Ir. 478; s. c. 25 Ir. L. T. R. 6).*

Practice—Taxation of costs—Solicitors' Remuneration Act, 1881, section 2—
Gen. Ord. 1884, R. (c), Schedule II.—“Other documents.”

The words “other documents” in the heading to Schedule II. to the General Order, made under the Solicitors' Remuneration Act, 1881, mean other documents *ejusdem generis* with deeds and wills.

An agreement for the execution of sewage works, made between a contractor and a board of town commissioners, though not a deed, is “conveyancing business” within the meaning of Sect. 2 of the Solicitors' Remuneration Act, 1881, and is taxable under the scale settled by Schedule II. of the above-mentioned General Order.

Ex parte O'Hagan (19 L. R. Ir. 99) followed.

Ante, p. 386.

In re Atkinson and Lurgan Commissioners (24 L. R. Ir. 182) con-
sidered. *Ante*, p. 498.

SUMMONS to vary the Taxing Officer's certificate.

Mr. Alexander Caruth, solicitor to the Ballymena Town Commissioners, furnished them with a bill of costs containing, amongst others, the following items:—

1888.	October 1.	(73) <i>Re</i> sewerage.	£	s.	d.	£	s.	d.
		Attending meeting of Com-						
		missioners to-day, when this						
		scheme was discussed; and						
		ultimately I was instructed						
		to prepare contract with con-						
		tractors,	-	-	-	0	13	4
		(74) Draft contract, 50						
		folios	-	-	-	5	0	0
						2	10	0

The report of the Taxing Officer (Master Matthews) was as follows:—

“The claim here made is under the head of ‘*Re* sewerage,’ and is for the draft contract with contractors of fifty folios at 2*s.* per

M. R.
1890.

folio, amounting to the sum of £5. By the objection Mr. Caruth claims to be allowed for the said draft contract at the above-mentioned rate of 2s. per folio. It was contended before me that the item in question should be allowed for, in accordance with Schedule II., General Order, 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, sect. 2. I considered that the said item does not relate to business within the terms of the Solicitors' Remuneration Act, 1881, and I therefore disallowed the objection. I beg to refer to the said contract and to *In re Atkinson & Sons, solicitors, and the Lurgan Town Commissioners* (1)."

Ante, p. 498.

The contract in question was an agreement between Dixon & Company, Contractors, and the Ballymena Town Commissioners for the construction of sewers in this district. It contained twenty-seven paragraphs, and was signed by the contractors, and the seal of Commissioners was affixed to it.

Mr. Bewley, Q.C., for Mr. Caruth :—

Ante, p. 386.

The Taxing Officer held that this contract should be taxed under the old system at 1s. per folio, but it is "conveyancing business" within the meaning of Section 2 of the Solicitors' Remuneration Act, 1881, and is taxable under Schedule II. of the General Order of 1884. "Other documents" means documents *ejusdem generis* with deeds and wills: *ex parte O'Hagan* (2). This contract is a document of that kind, and similar precedence will be found in books of conveyancing: Bythewood and Jarman, vol. 1, Prec. 31, 32, 33; Kay and Elphinstone, vol. 1, Prec. 1, 2, 3; Davidson, vol. 2, Part I., Prec. 27, 28, 29; Prideaux, vol. 1, Prec. 26. The Taxing Officer felt bound by the decision in *Atkinson and Lurgan Commissioners* (3); but that case is not binding on the Court, as the two Judges who constituted the Divisional Court differed, and Johnson, J., withdrew his judgment. This course was not approved of by the Court of Appeal in *Thornton v. Greene* (4). The proper course would have been to have had the case reheard before three judges. Johnson, J., was of opinion that items such as those in question here came within Schedule II.

Ante, p. 498.

The contract here is practically a deed. It is under the seal of

(1) 24 L. R. Ir. 182.

(2) 19 L. R. Ir. 99.

(3) 24 L. R. Ir. 182.

(4) 16 L. R. Ir. 396.

the Commissioners, though it is only signed by the contractors ; such documents are frequently prepared by counsel.

M. R.
1890.

Mr. David Christie, for the Commissioners :—

Atkinson's Case (1) is binding on the Court. The work done *Ante*, p. 498. there was the same as here. It does not come within the words of the Schedule "other documents"; it is not *ejusdem generis*; the words of the General Order II., R. (c), "including settlements," show this.

The fact that such contracts are to be found in books of conveyancing is not conclusive, as forms of many documents that are clearly not in the nature of "conveyancing business" will be found in them, *e.g.*, affidavits, notices, &c. The General Order was not intended to be exhaustive: *Parker v. Blenkhorn* (2), *ex parte* *Ante*, p. 483. *Strange* (3). The Vice-Chancellor there says that "other business" in Section 2 of the Act is business *ejusdem generis*, namely, conveyancing business. [THE MASTER OF THE ROLLS: "The Vice-Chancellor cited my decision in *ex parte O'Hagan*." (4).] *Ante*, p. 386.

A contract of this kind has not been shortened by the Conveyancing Acts; there are no covenants implied in it. The charge claimed is double the amount allowed under the old system.

THE MASTER OF THE ROLLS :—

Dec. 1.

The difficulty I feel in this case is occasioned by the result arrived at in the Queen's Bench Division in *Atkinson and Lurgan Commissioners* (5). Were it not for that case, and the view expressed by Mr. Justice O'Brien, I should entertain no doubt that the document, in respect of which I am asked to review the decision of the Taxing Master, comes within Schedule II. of the General Order of the 16th April, 1884, made under the Solicitors' Remuneration Act, 1881. To come within that schedule the document must, I think, be *ejusdem generis* with deeds and wills; and the document in the present case is an elaborate drainage contract, carefully and skilfully prepared, one of the class frequently sent to counsel to settle, and involving as much trouble in preparation as though ornamented

(1) 24 L. R. Ir. 182.

(2) 14 App. Cas. 7.

(3) 21 L. R. Ir. 529.

(4) 19 L. R. Ir. 99.

(5) 24 L. R. Ir. 182.

M. R.
1890.

with a wafer. During the argument I asked counsel if he could specify anything which could satisfy the words "other documents" in the schedule, if the contract before me would not, and he was unable to suggest any. Having put the same question to myself, I am unable to give any other rational construction to the words of the schedule, if a contract such as that before me, by which important legal rights are determined and bound, be not such a document.

Ante, p. 386.

In the case of *Ex parte O'Hagan* (1) I held that cases prepared for counsel, and statements for the information of clients, were not *ejusdem generis* with deeds or wills. I do not decide any general question beyond the particular contract before me. But books of conveyancing precedents contain forms of contracts like that in question here—a circumstance, of course, not conclusive of its being properly called conveyancing business, but a matter to be taken into account. Mr. Christie, in his ingenious argument, suggested that the documents included in the schedule were documents dealing with land; but there is not a word about land in the schedule, and wills and settlements, and other deeds themselves, often do not deal with land at all. The difficulty, as I have said, is as to the *Lurgan*

Ante, p. 498.

Commissioners' Case (2). I have not seen the documents that were before the Court in that case, but they were probably not dissimilar to that now before me. If that case were binding on me as a decision I would act upon it; but it was in so far peculiar as that the Court consisted of only two Judges, one of whom held that the documents were within the schedule, and the other that they were not. I do not presume to criticise that mode of decision, though it might have probably been more satisfactory, at least for my guidance, if another Judge had been called in. I had, as I have intimated, some little doubt as to what I ought to do, having regard to my

Ante, p. 386.

own expression of opinion in *Ex parte O'Hagan* (3), and that of the

Ante, p. 498.

Vice-Chancellor in *Ex parte Strange* (4), and of Kay, J., in *Stan-*

Ante, p. 248.

ford v. Roberts (5), that the "documents" must be documents *ejusdem generis* with deeds and wills. At first I thought I was bound to follow the result of the case in the Queen's Bench Division, but having consulted on the point with high judicial authority, I am

(1) 19 L. R. Ir. 99.

(2) 24 L. R. Ir. 182.

(3) 19 L. R. Ir. 99.

(4) 21 L. R. Ir. 529.

(5) 26 Ch. Div. 155.

of opinion that under the circumstances I should act upon my own view, whatever it may be. There is nothing in the order of the Queen's Bench Division so arrived at that would prevent its being reviewed by that branch of the Court in another case, and I feel bound to act upon my own opinion. I accordingly do so, and declare that the documents in this case should be taxed under the schedule, and therefore at 2s. a folio.

M. R.
1890.

Solicitor for the applicant: *Mr. Caruth.*

Solicitor for the Ballymena Commissioners: *Mr. Robert Christie.*

EARL OF AYLESFORD *v.* EARL POULETT.

(1886. A. 1480).

C. A.
1890.

North, J.

(*By permission*, from [1891] 1 Ch. 248; s.c. 39 W. R. 106, 241, 63 L. T. 519, 64 L. T. 236, 60 L. J. Ch. 204.)

Nov. 6.

C. A.

Solicitor—Costs—Taxation—Scale Fee—Mortgage—Further charge—Previous investigation of title—General Order under Solicitors' Remuneration Act, 1881, Sched. I., Part I., r. 10.

Dec. 19, 20.

The tenant for life of settled estates had created charges on his life estate for sums amounting in the whole to £192,000, and the charges had all become vested in an insurance company. A private Act was passed which empowered the trustees of the settlement to raise, by mortgaging the settled estates in fee, any sum not exceeding £350,000, for the purpose of paying the debts of the tenant for life. The trustees executed a mortgage of the estates in fee to the company to secure £232,000. Of this sum £192,000 was retained by the company in satisfaction of the charges on the life estate (which were released by a separate deed), and £40,000 was paid to the trustees:—

Held, by North, J., affirming the decision of the Taxing Master, that the transaction amounted to a further charge within the meaning of Rule 10 in Part I., of Sched. I., to the Solicitors' Remuneration Order, 1882; that the title to the property had been in substance already investigated within the meaning of that rule; and that the mortgagees' solicitor was not entitled to any scale fee in respect of the mortgage, but must be remunerated under Sched. II. to the Order:

Held, on appeal, that the transaction was a new mortgage, and not a further charge, and therefore did not fall within Rule 10, and that the mortgagees' solicitor was entitled to the scale-fee on a mortgage for £232,000.

C. A.
1890.

SUMMONS to review taxation of costs.

The action was brought by Charles, eighth Earl of Aylesford, who was tenant for life in possession of certain settled estates, against Earl Poulett and F. R. Knollys, who were trustees of a settlement of the estates, dated the 3rd of January, 1871, and also trustees for the purposes of a private Act of Parliament (45 & 46 Vict. c. 3), called the Earl of Aylesford's Estate Act, 1882. The Act was passed in the lifetime of the seventh Earl of Aylesford, the then tenant for life of the estates, to enable (*inter alia*) the trustees of the settled estates to raise money for payment of his debts. At the date of the passing of the Act there was existing a number of charges for sums amounting in the whole to £192,000 upon the life estate of the seventh Earl, all of which had then become vested in the trustees of the Eagle Insurance Company. The Act (by sect. 23) empowered the trustees at any time, or from time to time, after the passing thereof, to raise by mortgage of the settled estates, or any part thereof, any sum or sums not exceeding altogether £350,000, and provided that the trustees might convey the settled estates, or any part thereof, to any person or persons for an estate in fee simple, or any less estate, by way of mortgage for securing payment of the money raised and the interest thereon. And sect. 24 provided that every conveyance by way of mortgage made under the Act should take effect, subject to certain paramount charges, and also to the life estate charges, or such of them as should not be released, but in priority to all estates for life and estates in tail male, and to the remainder in fee limited by the settlement of 1871. The trustees were authorised out of the money so raised to pay off the mortgages on the life estate, and other debts of the tenant for life.

Under the power thus conferred on them the trustees on the 7th of August, 1883, executed a mortgage in fee of part of the settled estates to the trustees of the Eagle Company for £232,000, out of which sum the charges for £192,000 on the seventh Earl's life estate were retained by the Company, the sum of £40,000 only being in fact advanced by the Company to the trustees of the settlement. The mortgage deed contained a recital that all the charges on the Earl's life estate had been satisfied and released, and

the deed purported to be made in consideration of the sum of £232,000 to the trustees of the settlement "now paid" by the mortgagees. The charges on the life estate were released by a separate deed.

The seventh Earl died on the 13th of January, 1885, without issue male. By the statement of claim in the present case, the plaintiff, the eighth Earl, who, on the death of the seventh Earl, became tenant for life in possession of the settled estates, claimed (*inter alia*) an account of all moneys come to the hands of the defendants as trustees for the purposes of the Act, or as trustees of the settlement of 1871, and payment to the plaintiff of what (if anything) might be found due to him, as tenant for life under the settlement, from the defendants.

On the 26th of January, 1887, an order was made by MR. JUSTICE NORTH that an account should be taken of all moneys come to the hands of the defendants as trustees for the purposes of the Act, or as trustees of the settlement of 1871, and of the application of all such moneys.

Under this order the defendants brought in (*inter alia*) seventeen bills of costs which they claimed to charge against the moneys come to their hands as trustees, one of their bills being that of the solicitors of the Eagle Company in respect of the mortgage for £232,000. The chief clerk requested the Taxing Master to tax and settle these bills, to assist him in making proper allowances in respect thereof in taking the accounts of the trustees. Among other items in the bill of the Eagle Company's solicitors, which had been paid by the trustees, was a sum of £1,255 for commission in relation to the loan of £232,000 being the amount chargeable under the scale of the Incorporated Law Society. The Taxing Master disallowed this item to the extent of £1,110, thus reducing it to £145, that being the "scale fee" prescribed by the Solicitors' Remuneration Order of 1882 for investigating title and preparing and completing mortgage for £40,000. The defendants carried in an objection to this disallowance, in which they said, "the item of £1,255 should have been allowed at £455, being the amount according to the scale authorised by the Solicitors' Remuneration Act, 1881, upon a mortgage for £232,000. The mortgage for the £232,000 was a new and independent transaction, and entirely

C. A.
1890.

distinct from the mortgage for £192,000 which previously existed upon the life estate."

The plaintiff made the following answer to the objection:—"The £192,000 representing the mortgage on the late Earl's life estate was repaid out of the advance of £232,000, the sum lent on the fee of the settled estates. The nature of the security was changed, and £40,000 further was advanced; that is all. It is contended that the title was thoroughly investigated by the solicitors of the Eagle Company when the £192,000 was advanced, and that it would only be necessary for them to inspect a few further documents subsequently executed." The Taxing Master gave the following answer:—"The facts are correctly stated in the plaintiff's answer to the defendants' objection. The solicitors have already been once paid for investigating the title, at least, on £192,000, part of £232,000, that is on the life estate. On the present occasion an additional £40,000 was advanced, no doubt this time on the fee. But the transaction was between the same parties, and, as before observed, the proper fee had been already paid for investigating the title. On the present occasion the defendants are really entitled to nothing more than the proper charges under Schedule II., and I invited them to bring in such items. This they declined to do, contending that they were entitled to be allowed the full scale item on £232,000. In these circumstances I have, with the assent of the plaintiff's solicitors, allowed them £145, being the scale-fee on £40,000, which is, in my judgment, much more than the defendants would be allowed if items were brought in under Schedule II."

By the present summons the defendants asked that the above stated objection (and certain other objections) to the taxation of costs under the Chief Clerk's request might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly.

The summons was heard before MR. JUSTICE NORTH on the 6th of November, 1890.

Napier Higgins, Q.C., and Daunev, for the defendants :—

The scale fee in respect of £232,000 ought to have been allowed. The mortgage of the 7th of August, 1883, to the trustees of the

Eagle Company was not a transfer or a further charge. It was a new and independent transaction; the security being different from that of the former mortgages, and the parties different. Rule 10 (1) in Part I. of Schedule I. to the Remuneration Order does prevent the solicitor from claiming the scale fee in respect of £232,000. There was really a fresh investigation of title. The title to the fee had to be investigated, not merely the title to the life estate, and the authority of the trustees to mortgage the fee depended upon the Act.

North, J.
1890.

Cozens-Hardy Q.C., and *W. C. Druce*, for the plaintiff:—

The Court must look at the substance of the transaction, which was a further advance of £40,000 by the Eagle. The title to the fee was in substance the same as that to the life estate, and it had been quite recently investigated by the Company. The only new thing to be investigated was the private Act.

Napier Higgins, in reply:—

If the argument for the plaintiff is right, a solicitor can never claim the scale-fee in respect of a mortgage if there has ever been a previous partial investigation of the title to the property. In *Ex parte Mayor of London* (1) the title was a statutory one and the solicitor of the purchaser had only to look at an Act of Parliament, and a letter written by the Lord Chancellor authorising the sale; and Mr. Justice Kay held that the title had been investigated, and that the purchaser's solicitor was entitled to the scale-fee. Here the advance was made on the security of the new title created by the Act. The title was not the same, or in substance the same, as in the case of the prior mortgages. *Ante*, p. 371.

NORTH, J.:—

I think the words in which Rule 10 is expressed are not very clear; but, after the best consideration I have been able to give to the case, I have come to the conclusion that the Taxing Master's decision was right. [His Lordship read Rule 10.]

Let me put the simplest possible case. Suppose the owner in fee of an estate mortgages it and then dies, the mortgage being

(1) 34 Ch. D. 452.

North, J.
1890.

still in existence, and his son, claiming to be his heir-at-law, desires to obtain a further advance from the mortgagee on the security of the estate. Does Rule 10 exclude the right of the mortgagee's solicitor to the scale fee or not? It must be remembered that, if the scale does not apply, the solicitor will still be remunerated for his work, for an alternative mode of remuneration is provided by the rule. The only question is, whether the solicitor is to be paid in the one way or the other. In the simple case which I have put, could it or could it not be said that the title had been already investigated? Could it be said that the title had not been previously investigated, merely because it would be necessary to look at the will of the mortgagor or to inquire into the heirship of his son in order to see whether he had power to mortgage the property? The argument on one side is, that it can never be said that the title to property has been previously investigated, unless not the slightest change has taken place in the position of the mortgagor; and that, if anything further, however trifling, has to be done, there will be a fresh investigation of title. On the other side, it is asked could it be said that the title to mortgaged property had not been previously investigated merely because ten closes were comprised in the further charge, instead of only one in the original mortgage? In my opinion, the Court must deal with each case as it arises, and you must not test the rule by putting extreme cases. Suppose a mortgagor is tenant for life, his son being entitled to the remainder in fee. If the mortgagor obtains a further advance by means of a mortgage of the estate in fee by himself and his son, can it be said that there is a fresh investigation of the title? I think not, though the further charge will be on the estate in fee, and not on the life estate. What are the facts in the present case? The mortgages which had become vested in the trustees of the Eagle Company were charges upon the life estate of the tenant for life. The Act of Parliament enabled the trustees of the settlement to create a greater charge upon the fee of the estates. The trustees did create a greater charge upon the fee, taking in exchange for it a release of the existing charges upon the life interest, and a further advance of £40,000. In my opinion, there was not any fresh investigation of title, for the title had been already in substance investigated by the Company when they made the advance of £192,000. In my opinion,

the case is within the words of Rule 10, and the mere fact that it was necessary when the further advance was made to look at the provisions of the Act, does not prevent its being said that the title had been previously investigated within the meaning of the rule. On the best consideration I can give to the rule, I think that the £40,000 was a further charge, but that the solicitor was not entitled to the scale fee, because the title had been already investigated by him. In strictness, therefore, the solicitor was only entitled to be remunerated under Schedule II. to the Remuneration Order. But the plaintiff has submitted to the allowance of the scale fee in respect of £40,000, and I have not been asked to vary the order in this respect. The summons will be dismissed.

C. A.
1890.

The defendants appealed. The appeal was heard on the 19th of December, 1890.

C. A.

Napier Higgins, Q.C., and *Dauney*, for the appeal:—

The scale fees ought to be allowed on this as a new mortgage. It is to all intents and purposes such: it is on a different estate, and made by different parties from the old mortgages. It comes within Schedule I., Part I., of the Solicitors' Remuneration Order, 1882, and cannot be brought within Rule 10, for it is neither a transfer nor a further charge.

Cozens-Hardy, Q.C., and *W. C. Druce*, for the plaintiff:—

The substance and not the form of the transaction is to be looked at. The substance was a further advance of £40,000 and an additional security for the £192,000. Now the Schedule does not provide a scale fee for a deed giving further security. The title had been investigated when the Eagle Company advanced the £192,000 and there was nothing more to peruse except the Aylesford Estate Act. The work for which the scale is given was therefore not performed.

Napier Higgins, in reply:—

The transaction was a new transaction. The £232,000 was borrowed at a lower rate of interest than the £192,000 carried. The scale fee cannot cease to be applicable merely because a part of the title had been previously investigated. Here was a new

L.A.
1890.
Ante, p. 371.

statutory title which required to be carefully examined. The scale fee was allowed in *ex-parte Mayor of London* (1) where nothing had to be perused but an Act of Parliament.

Dec. 20.

LINDLEY, L. J. :—

This is a question of some importance to solicitors. The late tenant for life of the Aylesford estates was indebted to the Eagle Company in a considerable sum, the Company having mortgages on his life estate for sums amounting to £192,000. In 1882 the Aylesford Estate Act was passed, which, after reciting the incumbrances on the life estate, empowered the trustees of the settlement to raise by mortgage of the settled estates any sum or sums not exceeding in the whole £350,000, and to apply the money so raised in paying off the charges on the life interest and other debts of the tenant for life. Under that power the trustees mortgaged in fee a part of the settled estates to the Eagle Company for £232,000, out of which £192,000 was applied in paying off the mortgages on the life interest, and so was retained by the Eagle Company. To the extent of the mortgages so paid off nothing passed in the shape of cash, the sum actually advanced to the trustees by the Eagle Company being only £40,000. The question before us is whether the trustees are to be allowed to charge in their account a scale fee of £455, being the fee for negotiating loan and investigating title on a mortgage for £232,000. The question turns on the rules under the Solicitors' Remuneration Act, 1881, Schedule I., Part I., and Rule 10 in that Schedule. By the first part of the Schedule a mortgagee's solicitor is entitled to a scale fee "for negotiating loan," and to another scale fee "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage." Then Rule 10 provides that "the above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or in any previous transfer; and it is not to apply to further charges where the title has been so previously investigated. As to such transfers and further charges the remuneration is to be regulated according to the present system as

(1) 34 Ch. D. 452.

altered by Schedule II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable." The Taxing Master having allowed only the scale fee on £40,000, the defendants carried in this objection:—"The item of £1,255 should have been allowed at £455, being the amount according to the scale authorised by the Solicitors' Remuneration Act, 1881, upon a mortgage for £232,000. The mortgage for the £232,000 was a new and independent transaction, and entirely distinct from the mortgage for £192,000 which previously existed on the life estate." The Taxing Master answered:—"The solicitors have already been once paid for investigating the title, at least on £192,000, part of £232,000—that is on the life estate. On the present occasion an additional £40,000 was advanced, no doubt this time on the fee. But the transaction was between the same parties, and, as before observed, the proper fee had been already paid for investigating the title. On the present occasion the defendants are really entitled to nothing more than the proper charges under Schedule II., and I invited them to bring in such items. This they declined to do, contending that they were entitled to be allowed the full scale item on £232,000. In these circumstances I have, with the assent of the plaintiff's solicitors, allowed them £145, being the scale fee on £40,000, which is in my judgment much more than the defendants would be allowed if items were brought in under Schedule II." This appears to proceed on the theory that this mortgage is a further charge within Rule 10. It cannot be contended that it is a transfer; but the Taxing Master treated it as a further charge on property the title to which had been previously investigated by the same solicitor. Now, no doubt the title had been investigated on behalf of the Eagle Company when they advanced the £192,000; but the question is whether the transaction can be considered a further charge. I think that it cannot. I will not sacrifice substance to form; but it appears to me that the deed of the 7th August, 1883, was really and in substance a new mortgage under the statutory power given to the trustees, and cannot be treated as a deed of further charge. It is not on the same property, being a mortgage in fee of part of the property, whereas the former mortgages were on the interest of the tenant for life in the whole of the property; and it was not made

C. A.
1890.

by the same parties, being made by the trustees and not by the tenant for life. It is then, in my opinion, nothing but a new mortgage for £232,000. It is true that only £40,000 was advanced in cash; but that does not make the transaction a further charge for £40,000. It is a new mortgage in fee for £232,000, and falls within Schedule I., and the scale fees for negotiating a loan of that amount and for investigating title, and preparing and completing mortgage, must be allowed.

BOWEN, L.J.:—

Rule 10 of Schedule I. is both affirmative and negative; and if the present case is within the rule it must fall within the second part of it—viz., that the scale is not to apply to further charges where the title has been previously investigated. But to bring the present case within those words it must be made out that this is a deed of further charge, which in my opinion it is not.

FRY, L.J.:—

If we had a discretion as to the taxation of costs, I am not sure that I should not agree with the Taxing Master and Mr. Justice North. But the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44, s. 7) enacts that so long as any General Order under the Act is in operation the taxation of Solicitors' bills of costs shall be regulated thereby. We have therefore no discretion to depart from the terms of the Order. The present instrument cannot fall within Rule 10 unless it is a transfer or a further charge. It cannot be contended that it is a transfer, and I am of opinion that it is not a further charge. The trustees were bound to raise money by mortgage of the estate, and apply the money in paying off the subsisting charges on the life interest. The instrument by which they raise the money is a new mortgage, and cannot be held a further charge, because only a part of the sum raised was actually advanced in cash. I am of opinion, therefore, that the appeal succeeds.

Solicitors: *Kaye & Guedella; Bennett, Dawson & Bennett.*

In re MACGOWAN.

MACGOWAN *v.* MURRAY.

(1883. M. 451).

(*By permission*, from [1891] 1 Ch. 105; s. c. 59 W. R. 227, 62 L. T. 793, 60 L. J. Ch. 118).

(Before KAY, J.).

C. A.
1890.

Kay, J.

Nov. 8,

C. A.

Dec. 17, 18.

Costs—Conveyancing—Scale Fee—Negotiation of Sale by Private Contract—Contract conditional on sanction of Court—Payment of Fee to Estate Agent—General Order under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), Sched. I., Part I., r. 11.

The Solicitor to the trustees of property which was the subject of an action in the Chancery Division negotiated a sale thereof, and prepared and procured the due signature of a contract of sale and purchase conditional upon the sanction of the Court being given to it. In the course of the negotiation, and for the purpose of obtaining evidence to induce the Court to sanction the sale, he procured the opinions of two valuers, to whom fees were paid for reporting as to the value of the property, but who took no further part in the negotiation. The contract was sanctioned by the Court without alteration :

Held (reversing the decision of Kay, J.) that the solicitor had negotiated the sale within the meaning of Rule 11 in Sched. I., Part I. to the General Order, and was entitled to the scale fee for negotiating a sale by private contract.

ADJOURNED SUMMONS—

This action was brought by infant beneficiaries for the administration of the estate of a testatrix, which comprised a mortgage for £6,000 on certain building land.

Judgment in the action directing usual accounts and inquiries was given on the 22nd of May, 1883, and by the Order made on further consideration on the 1st of August, 1885, the defendant and Adam Murray were appointed new trustees of the will, and the mortgage was vested in them.

Messrs. Darbisher, Tatham & Worthington, of Manchester, acted as solicitors for the plaintiffs and defendant and Adam Murray.

Proceedings for foreclosure of the mortgaged property were taken by the trustees, and, pending such proceedings, Mr. Tatham,

Kay, J.
1890.

a member of the above-named firm, entered into negotiations for the sale of the property, and on the 19th of March received from a bank an offer to purchase at the price of £5,000.

The property had in 1883 been valued at the sum of £9,332 by a firm of valuers, and Tatham, on receiving the above offer, obtained from them a report that the price now offered was a fair and proper one.

An order having been obtained for foreclosure absolute, Tatham verbally accepted the offer, subject to the preparation and completion of a formal contract in writing, and to the sanction of the Court to such contract being given in the present action. He also prepared a conditional contract, which was signed on the 28th of July, 1888.

Tatham also obtained a report as to the value of the property from another firm of valuers, and affidavits in support of the application for the sanction of the Court were made by members of each of the two firms of valuers deposing that £5,000 was a fair and proper price. Fees of £3 13s. 6d. and £1 1s. were respectively paid to the firms of valuers, and both these sums were included in the plaintiffs' bill of costs. No further sums were paid to the valuers, nor was any other surveyor or valuer called in.

The contract was duly approved by the Court without alteration, and an order was made on the 27th of March, 1890, directing taxation of the costs of the plaintiffs and the defendant and Adam Murray, including in the costs of the defendant and Adam Murray any charges and expenses properly incurred by them in the administration of the estate beyond their costs of suit.

The solicitors included in their bill of costs, in addition to charges for obtaining the sanction of the Court to the contract, the sum of £40 as the scale fee payable to them under the General Order to the Solicitors' Remuneration Act, 1881, Schedule I, Part I, rule 11, for negotiating the sale of the property for £5,000 by private contract.

The Taxing Master disallowed the £40, considering that the solicitors were only entitled to be paid according to Sched. II. of the General Order, as it was admitted by the solicitors that before the contract was made they consulted a firm of valuers, so that the price was not arrived at without a payment by the client to such

firm. He also stated that it was not clear to his mind that when a sale or purchase had to be approved by the Court a negotiation fee could ever be supported, as in every case a considerable sum, in addition to the negotiation fee, must be paid by the client, and this the solicitor knew before starting on the business.

The present summons was taken out by the defendant and Adam Murray to review the taxation in respect of the disallowance of the fee of £40. The summons was heard before Mr. Justice Kay on the 8th of November, 1890.

Marten, Q.C., and Danenport, in support of the summons:—

The solicitor in this case “arranged” the sale, and the price and terms and conditions thereof, within the meaning of Rule 11 in Sched. I., Part I., of the General Order to the Solicitors’ Remuneration Act, 1881, and as no commission was paid by the client to an auctioneer or estate or other agent, the scale fee for negotiating is clearly payable in accordance with that rule. The Taxing Master was in error in supposing that a commission was paid to the valuers; they were merely paid the proper fees for reporting as to the value, and such a payment is entirely different from payment of commission, whether by way of a lump sum or otherwise: *Parker v. Blenkinshorn* (1). When the conditional contract was signed the negotiation was complete; the price had then been “arranged,” and all that remained was for the Court to approve or reject it. The valuers took no part in the negotiation, and had nothing whatever to do with the arrangement of the sale, or the price, terms, or conditions.

The Taxing Master has suggested that the scale fee does not apply in any case where the sanction of the Court is required; but that is contrary to *Stanford v. Roberts*, (2) which decides that the scale fees are payable though the business is transacted in an action. *Ante*, p. 248.

[KAY, J.:—*Stanford v. Roberts* was decided under a different section of the Act, and has no application. In this case everything depends on Rule 11.]

In re Wilson (3) shows that the exception in Rule 11 only applies where the solicitor does not himself do the work for which the remuneration is provided: here the solicitor did all the work of negotiation.

(1) 14 App. Cas. 1.

(2) 26 Ch. D. 155.

(3) 29 Ch. D. 790.

Kay, J.
1890.

[KAY, J. :—The question is whether the word “arrange” implies a complete contract or only negotiation up to a certain point.]

Ante, p. 492.

Lord Macnaghten in *Parker v. Blenkhorn* (1) speaks of the preliminary stage of negotiation. “Arrangement” is something short of final settlement and determination. An arrangement may exist though the sanction of the Court is required, *ex. gr.*, in cases under the Joint Stock Companies Arrangement Act, 1870, 33 & 34 Vict. c. 104. In the case of an ordinary sale by a private vendor, the arrangement of the sale by the solicitor, though complete so far as he is concerned, depends for its efficacy on the approval of his client. Here we say that the solicitor arranged the sale, and the sanction of the Court was given to the arrangement which he had made.

Levett, for the plaintiffs, was not called upon.

KAY, J. :—

I am of opinion that the Taxing Master is right in this case. The facts are these. The trustees of a property which was the subject of an action in this Court, by their solicitor, entered into negotiations to sell the property, and the solicitor managed to obtain an offer from a bank to purchase for £5,000. He made an arrangement with the bank to sell the property to them for that sum, upon condition that the Court should sanction such a sale. He then obtained evidence in order to induce the Court to sanction the sale, and in the course of obtaining that evidence he procured the opinions of two skilled persons as valuers, who made affidavits to the effect that the price was fair and proper. He has been allowed the scale fee for completing the sale. That is in accordance with *Stanford v. Roberts* (2) which determines that the solicitor is entitled to that fee although the sale is carried out in an action. Now he seeks to be allowed the scale fee for negotiation, and also in addition the costs of obtaining the sanction of the Court to the conditional contract. If he is entitled to that it must be on the footing that the obtaining of the conditional contract entitles him to the scale fee. Looking at the language of Rule 11 of Sched. I., Part I., to the General Order, I very much doubt whether the obtaining of a contract which is conditional on the sanction of the Court being given

Ante, p. 248.

(1) 14 App. Cas. 10.

(2) 26 Ch. D. 155.

to it, would entitle the solicitor to a scale fee. But can it be said that he has arranged the price? That is another point in the case. The Taxing Master thinks that he has not arranged a price, but that the price was in fact arranged—that is, fixed and settled—by the Court which had the sanction of the matter; and also that he never did arrange a contract, because the contract was not complete and perfect until the Court had sanctioned it.

Now, if it be the law that a solicitor is not entitled to the scale fee for negotiating, unless he conducts the negotiation up to a complete contract—complete in all respects as to price, terms, and everything else—then all I can say is that this solicitor did not do that. He did conduct the negotiation up to the step of obtaining a conditional contract, but additional expense was incurred after that before the contract could be finally arranged. I have to consider what is the meaning of the word “arrange.” By Schedule I. Part I., of the General Order made in pursuance of the Act of 1881, the vendor’s solicitor is to be paid a certain scale fee “for negotiating, a sale of property by private contract,” and for deducing title, perusing and completing conveyance, &c., a certain other scale fee. Then Rule 11 in the same schedule does not apply to deducing title and completing conveyance, but does apply to negotiating the sale, and the material part of that rule is as follows:—“The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate, or other agent.” Taking those last words first, the meaning of them is to my mind quite plain. When the solicitor has done all the work himself without having employed an auctioneer or estate or other agent to assist him, and the work results in a complete contract, then he is entitled to the scale fee. But if he does not do all the work, if part of the work is done by an auctioneer or estate or other agent who is paid for that assistance, then the solicitor is not entitled to the scale fee, because that part of the work is not done by him. That must be the meaning of the rule.

Now, did this solicitor arrange the sale, and the price, the terms, and the conditions of the sale? He certainly did not finally arrange them, because they were finally arranged by the Court. As I read the rule, the word “arrange” means “finally arrange,” and the scale

Kay, J.
1890.

fee for negotiating applies where the solicitor himself completes the arrangement. Therefore I incline to agree with the Taxing Master that the complete arrangement of the sale never was made by the solicitor without assistance. It was made by the Court, and in order to obtain the sanction of the Court a good deal of additional expense had to be incurred. Then did he arrange the price? He negotiated with a bank for the sale of the property to the bank for £5,000 if the Court approved the price. In one sense he arranged the price; but did he completely arrange it? Was there a binding contract between the vendors and the bank as the result of the negotiation? Clearly not. Until the Court accepted the price and approved the sale the contract was conditional and might fall through. If the Court had declined to approve the price, there would have been no contract at all. If the Court said that the price must be increased, it is quite plain that there would have been no contract at all until the price had been increased. Therefore it seems to me that the word "arrange" in this clause of Rule 11, which only applies to negotiation, means that there must be a complete negotiation resulting in a binding contract, and that the solicitor is not entitled to the fee unless he carries out the negotiation himself without paying anything to anybody else up to the time when there is a binding contract. I will illustrate the matter as I did in the course of the argument. Suppose there is a contract in this form, the vendor agrees with the purchaser to sell the property at a price to be fixed by A. B., an auctioneer; and then A. B. is paid a commission for fixing the price. Could it possibly be said that the solicitor had arranged the price without paying commission to any one? That is the sort of case which the rule was meant to provide for. Let me take it a little nearer. Suppose the contract had been that these trustees agreed to sell to the bank for £5,000 if that price was said to be fair by A. B., an auctioneer, and A. B. was to have a sum paid to him for his services in the matter. Could it then be said that the solicitor had arranged the price within the meaning of the rule? In my opinion it could not. It seems to me that the rule means that the solicitor shall himself, unaided, without any other person being paid for assistance, arrange the price and the other matters mentioned. I cannot say that this solicitor has done that. Therefore I think the Taxing Master was right. This case

is not in the least governed by the decision in *Stanford v. Roberts* (1) and other cases which approved *Stanford v. Roberts* in the Court of Appeal, because those were not cases to which Rule 11 applied at all; they were cases under the other part of the Act which relates to completing conveyance, and Rule 11 does not apply to that, but only to negotiation. C.A. 1890. Ante, p. 248.

From this decision the defendant and Adam Murray appealed. The appeal came on for hearing on the 17th of December, 1890.

Sir Horace Davey, Q.C., and Davenport, for the appellants:—

The negotiations were completed and all the terms and conditions settled by the solicitor before the contract was referred to the Court. Mr. Justice Kay thought that the sale was not arranged till the contract was definitely approved by the Court. But we contend that this is a mistake. The solicitor's duty ceased when the parties to the contract had agreed to the terms. The Court made no alteration in the terms. If it had refused its consent, a different question would have arisen: *Parker v. Blenkhorn* (2).

Ante, p. 83.

With respect to the fees paid to the valuers, they were not paid by way of commission, nor were the valuers acting as the agents of the vendors, but they were simply consulted as to the value of the property, and their evidence was obtained for the purpose of informing the mind of the Court: *In re Wilson* (3). *In re Merchant Taylors' Company* (4). *Ante, p. 294.*

Levett, for the plaintiffs:—

The negotiations were not complete till the contract had been sanctioned by the Court; it was made conditional on that sanction being given. If the Court had refused its approval, or if it had altered the terms, the solicitor would not have been entitled to the scale fee. The arrangement cannot be said to be completed when nobody is bound; if, for instance, the acceptance is made subject to the consent of a third party. The vendor and purchaser were never *ad idem* till the Court had given its sanction. Therefore, till that had been obtained the solicitor could only claim a *quantum meruit*. If he had claimed the scale fees for all his work

(1) 26 Ch. D. 155.

(3) 29 Ch. D. 790.

(2) 14 App. Cas. 1, 10.

(4) 30 Ch. D. 28.

C. A.
1890.

till the confirmation of the sale the claim would have been intelligible; but he claims the scale fees in addition to payment for his work in obtaining the sanction of the Court.

We also contend that the solicitor is excluded from the rule by having employed at his clients' expense two land agents. This was done before the contract was agreed to by the parties, and during the progress of the negotiations. It is therefore clearly within the exception in the rule.

LINDLEY, L.J.:—

This case raises a very important point upon the taxation of solicitors' bills of costs where sales are conducted under the order or direction of the Court; everybody knows that in every case of that kind there can be no binding contract, and there never is any binding contract until the Court has approved of it. Every sale under the direction of the Court takes this turn; there are proposals laid before the Court for its approval; if the Court does not approve, the proposals go off, or have to be modified, and if it does approve, of course there is a binding contract. The rule relating to this matter which we have to consider is to be found in Sched. I., Part I., of the General Order made under the Solicitors' Remuneration Act. The Schedule says this in Part I., "Scale of charges on sales, purchases, and mortgages, and rules applicable thereto." Then, "vendor's solicitor, for negotiating a sale of property by private contract, 20s. per £100." Then, after a reference to a sale of property by public auction, there is an item for deducing title, which I only refer to for this purpose, namely, that it includes "the preparation of contract or conditions of sale," so much. Then in connection with that we have Rule 11. "The scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate, or other agent."

Now the facts in this case were shortly as follows:—A lady whose estate was being administered in Chancery was entitled to £6,000 upon the mortgage of some property, and there was a foreclosure order made. Steps were then taken to have it sold. The

solicitor to the trust had an offer from some bankers. They said they would buy it out and out for £5,000. He thought that a fair price; he knew perfectly well that, even if it were a fair price, he could not effect a sale on behalf of his clients at that or any other price without obtaining the sanction of the Court; he knew he could not obtain that sanction without laying before the Court proper evidence that the price was a fair one. So what he does is this. He goes to certain gentlemen, who, he knew, had valued the property some years before, and asks them whether £5,000 is a fair price. They said "Yes," and he got them afterwards to make an affidavit to that effect, for which he paid three guineas and a half and one guinea. He carries the case into Court, and the sale at £5,000 is approved. Then he says, "Now pay me for negotiating that sale the scale charges, and pay me in addition what I have paid these two gentlemen for satisfying the Court that the proposals I have laid before the Court are fit and proper, and ought to be allowed." The Taxing Mster has disallowed that, and Mr. Justice Kay has upheld the Taxing Master's decision. The Taxing Master disallowed the claim for two reasons: "First of all," he says, "you have not negotiated the sale within the meaning of this rule; and, secondly, your clients have paid commission to an agent."

Now let us see what the first proposition involves. I think I do not misunderstand the Taxing Master, who is an extremely experienced officer, when I construe his observations as amounting to an intimation of opinion upon his part that this scale fee never applies to sales under the direction of the Court. His 9th observation is this: "It is not at all clear to my mind that where the sale or purchase has to be approved by the Court that 'negotiation fee' can ever be supported, as in every such case a considerable sum, in addition to the negotiation fee, must be paid by the client, and this the solicitor knows before starting on the business." Now it appears to me there is a little confusion of thought there as to what "negotiation" means. What is a solicitor who has the conduct of the sale in Court to do? What is his business as a negotiator? I cannot understand that it is anything more than this, to obtain all the terms and all the conditions, including the cost price, which are to be laid before the Court. It is his business

C. A.
1890.

to negotiate that; it is not his business as negotiator to see to their performance. That is quite another matter. But when he draws up the proposals, and finally settles the proposals, which are laid before the Court for its approval, it appears to me to finish that part of the business which can properly be called "negotiation." If in the course of doing that, he charges his client, or his client pays or has to pay—I do not attach any importance to actual payments—according to the language of the rule, any commission to an auctioneer, estate or other agent, then the scale fee is not applicable.

Now, supposing that I am right to that extent, it appears to me that this solicitor did, in the language of this rule, as the solicitor of the vendors, arrange the sale and the price, and the terms and the conditions thereof—that is to say, he brought the parties to a point, and said, "There are the terms, there is the price, and there are the conditions." That is the negotiation. Therefore, so far it appears to me, he is within the rule.

Then it is said he is excluded from the second clause of this rule, "and no commission is paid by the client to an auctioneer, or an estate or other agent." That appears to me to mean necessarily this, that no commission is paid by the client, or payable—I put that word in—"to an auctioneer, estate or other agent," as part of the negotiation. It cannot be that no fee is to be paid; or no commission is to be paid by the client in the course of performing the conditions of the contract; that is not within the rule.

Now, what the solicitor has done is this. I take the facts in substance from Mr. Tatham's affidavit which is obviously a truthful affidavit, and from what is stated in the objection, which is to the same effect. What Mr. Tatham says, in substance, is this: I negotiated the sale, but I knew perfectly well, in order that the approval of the Court should be obtained, that I must obtain evidence to satisfy the Court that the price was proper; and therefore I paid these fees, but not as part of the negotiation; and he says, I am entitled to the scale fees, *plus* these. I think he is right on that. Mr. Levett says, that in this particular case the facts are not quite in accordance with the statement I have made—he says, in fact, "You, the solicitor, went and negotiated with this surveyor, and even if you did not pay him, you became liable to pay him as

part of the negotiations." Well, the solicitor explains that. He says, I might have gone after I had got this proposal; but I did not go after that, because I knew perfectly well it would be absurd for me to go to the Court unless I had got it, and therefore I got it before instead of after. Still, the question arises, did he get the affidavits as part of the negotiations, or did he get them for the purpose of performing the condition? It appears to me that he got them for the latter purpose, and that the view taken by the solicitor is right. The appeal must be allowed.

C. A.
1890.

BOWEN, L.J. :—

I am of the same opinion, and I must add my views, as we are differing from the learned Judge who decided the case.

I begin by stating that we are not now discussing the construction of the rule with regard to a case in which the sale has gone off, and what I am going to say applies to cases in which the sale has not gone off, but in which the negotiations with the agent have terminated in a successful sale.

Now, what does the rule say? The rule lays down two conditions upon which alone the scale for negotiating is to apply. The first is an affirmative or positive condition. The solicitor must have arranged the sale or purchase, and the price and the terms and conditions thereof. The second is a negative condition. He must have done that; but the client must have not have paid any commission to an auctioneer, or estate or other agent. The first is affirmative. The second, which also must exist before the scale can be applied, is a negative one. Not only must the first condition have been fulfilled, but the prohibition of the second condition must not have been infringed. When the second condition says that no commission must be paid by the client, it means, I think, it must neither be paid, nor must the client be made liable in law to pay, because I think the one is really the same as the other in the eyes of the law. Where those two conditions are fulfilled the scale applies.

Now, the first observation which it seems to me to be necessary to make is, that this rule must be intended to apply to cases where the agent has only power to negotiate; it cannot be that it is only meant to be applicable in cases where the agent has power to com-

C. A.
1890.

plete the whole contract as well as to complete the negotiation. If that is so, what does the first condition mean when it says that the solicitor, before the scale applies, must arrange the sale or purchase, and the price and terms and conditions thereof? In cases where the sale is ultimately effected, the solicitor arranges the sale if he brings the negotiation to a close, which leaves his principal free to accept or not, and if, as a fact, his principal afterwards does accept. Negotiation, I should have thought, in the ordinary meaning of the English language, is that which passes between parties or their agents in the course of or incident to the making of the contract; and if the negotiation is brought to such a close as leaves the principal at liberty to say, "I accept the offer," then the agent has done all that a negotiating agent can do, and within the meaning of the rule he has arranged the sale, the sale afterwards being effected. Mr. Levett says that the arrangement is not complete if the principal has had to consult somebody else; or, if the principal chooses to consult somebody else before he consents. Really, with great respect to a most ingenious argument, it is an absurdity. The argument went to this, that a solicitor does not arrange a sale if the principal goes down to Brighton to consult his wife before he accepts. Now, is that possible? But if the solicitor has nevertheless arranged completely, although the principal may take time to consult a third person, why has he not arranged because the principal has to get the sanction of the Court before he can effectuate the sale, provided that the Court in the result does consent? It seems to me that it is clear that the solicitor has arranged, if he has done all that a man can do who is appointed an agent to negotiate, and if his efforts are crowned in the end with success. If that is so, then the first branch of the definition is fulfilled. The solicitor here has arranged the sale.

Is the negative condition complied with? Has any commission been paid by the client to an auctioneer or estate or other agent? The answer seems to me to be clear, that no commission has been paid at all to anybody. A commission means a payment on a particular scale paid to an agent for agency work; but this fee has not been paid by the solicitor on behalf of the client to anybody as agent—it was paid to obtain the expert evidence of a witness. That is really what it was intended for. However you characterise it, the

last words, it seems to me, in which you can properly characterise it, are as commission paid to an auctioneer or estate or other agent.

The learned Judge put a construction upon this rule which would exclude, it seems to me, from the operation of it, a vast amount of business which the rule must have been intended to cover. It certainly covers, to my mind, cases in which the agent is appointed as agent to negotiate only, and I think it certainly ought to cover cases in which sales are effected under the sanction of the Court. The learned Judge says: “‘Arrange,’ I think, in this Rule 11, which only applies to negotiations, means that the negotiations must be quite complete and resulting in a binding contract.” If he means by that that the solicitor cannot get the fee when he is only an agent to negotiate, whether his negotiation is or is not adopted by his principal, it seems to me that it makes the rule inapplicable to a vast mass of business; and if he means that the negotiation must result in a binding contract by the principal without any necessity for the sanction of the Court, I do not myself see any valid reason for the distinction.

FRY, L.J. :—

I will endeavour with what brevity I can to express my concurrence in the opinion of my learned brethren. We are concerned with interpreting a rule which decides under what circumstances the vendor's solicitor is to be entitled to a fee for negotiating a sale of property by private contract. Now, it appears to me that there is no better ascertained distinction than that which exists between negotiations for a contract and the contract itself, and that the negotiations continue up to the point when the consent of the consenting party is given. They cease there. Now the cases to which the rule is to be applied are defined in these words: “The scale fee for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof.” According to my view of the facts of this case, the solicitor did in fact arrange the sale, the price, the terms, and the conditions. He had an interview with the bank manager, who, he found, was willing to give a sum of £5,000. He then settled the terms with the bank manager or their solicitor. He arranged with them the terms and conditions of the contract, and then pre-

C. A.
1890.

sented it in that form to the Court. I think, therefore, in point of fact he did arrange all the things that were there mentioned.

Now, it was said by the learned Judge that in such a case as this the solicitor does not arrange, but that the Court arranges. We are not dealing with a case in which the Court has refused to accede to or approve of the terms which had been settled by the solicitor. It may be that there are cases in which it might be truly said that the Judge in Chambers has arranged the terms or the conditions of sale. About those cases I say nothing. Nothing of the kind occurs in the present instance. So far as we have heard, the contract, as settled by Mr. Tatham, in conjunction with the solicitors of the bank, was adopted and approved by the Court. Therefore, I think, the affirmative words are amply satisfied in this case.

The second inquiry is this: Has any commission been paid or, I may say, is any commission payable by the client to an auctioneer or to an estate or other agent? The auctioneer is out of the question. The only thing that can be said is that two fees, one of three and a half guineas and the other of one guinea, were paid to two gentlemen, who, I suppose, may be described as estate agents. They are called valuers, and, no doubt, carry on business as estate agents. They were not employed in this case as agents, and, therefore, they could earn no commission; and, therefore, no commission was either paid or payable to them. What was paid to them, or is payable to them, are fees in the one case for inspecting and making an affidavit as to the value of the property, and in the other for making an affidavit with regard to the value of the property without inspecting. They are not commissions. I think the solicitor, therefore, has brought his case within the very terms and within the meaning and spirit of this rule, and, therefore, this appeal must be allowed.

Solicitors: *Cunliffes & Davenport*, for *Darbishire, Tatham*, and *Worthington*, Manchester: *Bower, Cotton, & Bower*.

BELFAST MINERAL WATER COMPANY v. DEMPSEY.

*Consol. Taxing
Office,
1891.*

(Before MASTER MATTHEWS.)

Feb. 13, 20.

(By permission, from 25 Ir. L. T. 587.)

Costs—Taxation—Claim and counterclaim—Taxation where plaintiff succeeds on claim, and no rule is made on counterclaim, each party being directed to bear their own costs of the counterclaim.

THE action was brought by the plaintiffs for an injunction to prevent the defendant placing manure and other deposits and obstructions on a certain roadway in the neighbourhood of Belfast to which the plaintiffs claimed to be entitled. The defendant, by his defence, traversed the cause of action, and put in a counterclaim by which he claimed damages against the plaintiffs for building sheds on a roadway, and sought specific performance of certain clauses in leases under which the plaintiffs held, by which the plaintiffs contracted to join with the defendant in paving and sewerage a new street. The Vice-Chancellor, by his judgment, granted the injunction asked by the plaintiffs with costs, and dismissed the counterclaim. The defendant appealed, and the Court of Appeal confirmed the Vice-Chancellor's order as to the relief claimed in the original action, but discharged his order on the counterclaim, made no rule on the counterclaim, and directed each party to bear their own costs of the counterclaim. The costs came on for taxation before Master Matthews. It appeared that there was only one brief made up for counsel for the plaintiffs in the action and counterclaim, and one fee was paid to senior and to junior counsel. The Taxing Master being of opinion that certain sums, amongst others these payments, were "common items," as defined by Lord Justice FitzGibbon in *Griffiths v. Patterson* (1), considered that he should tax off the amount claimed for counsel's fees, for briefs and for solicitor's attendances, a proportion as being paid in respect of the counterclaim, although he was of opinion that the entire amount of the fees would have been properly taxable as costs of the original action had there been no counterclaim; but before making any decision he had the matter put in his list a week later for argument by counsel on either side. *Ante*, p. 452.

(1) 22 L. R. Ir. 656, at page 661.

Consol. Taxing Office, 1891. G. A. Hume, for the plaintiffs, submitted that the entire of these costs paid should be allowed on the ground that they would have been properly incurred in the original action had there been no counterclaim, and contended that in taxing the costs even where the costs of the claim were given to the plaintiff and of the counterclaim to the defendant, the Taxing Master should tax the costs of the claim as of a separate action, irrespective of the counterclaim altogether. He relied on *Buines v. Bromley* (1), *Lowe v. Holme* (2), *In re Brown*, *Ward v. Morse* (3), *Hewitt v. Blumer* (4), *Shrapnel v. Laing* (5), *Griffiths v. Patterson* (6), especially on the judgment of Lord Esher, M.R., in *Shrapnel v. Laing* at page 338. "The ground upon which the rule is founded is that the claim is a cause of action by itself, and the counterclaim is another and independent cause of action to be treated as if the claim did not exist. Here the claim and counterclaim are to be treated as independent actions founded upon different circumstances, and in respect of independent transactions. That being so, it follows that the taxation of costs must be conducted on the same footing. If so, the costs of the claim are to be taxed as though the claim were an action by itself." Counsel submitted that in this action where no costs of the counterclaim were allowed and the Taxing Master was merely obliged to tax the costs of the claim, he should have no regard to the counterclaim, but should allow such fees and charges as he should consider would have been properly payable in the original action had there been no counterclaim.

The TAXING MASTER said that he was satisfied that the entire sums so paid, being properly payable in the original action, should be allowed to the plaintiffs as part of their costs without reference to the counterclaim, and intimated that he would tax costs on that principle.

Solicitors for the plaintiffs: *Clarke & McCartan*.

- (1) 6 Q. B. D. 691.
- (2) 10 Q. B. D. 286.
- (3) 23 Ch. D. 377.

- (4) 3 Times Law Reports, 221.
- (5) 20 Q. B. D. 334.
- (6) 22 L. R. Ir. 656.

In re WITHALL.

(1889—W. 2,164.)

C. A.
1891.North, J.
April 29.C. A.
June 3.

(By permission, from [1891] 3 Ch. 8; s. c. 39 W. R. 529, 64 L. T. 704, 61 L. J. Ch 14.)

Solicitor—Scale Fee—Negotiation Fee—Commission—General Order under Solicitors' Remuneration Act, 1881, Schedule I., Part I., Rule 11.

S. employed H. as general agent with a view to developing an estate as a building property, on the terms of his having a commission of $2\frac{1}{2}$ per cent. on the purchase money of all lands sold during his agency, and on the capitalised value of the rents of all leases granted during the same period. An offer was made for purchase at a time when H. was too ill to attend at his office, and the negotiation was conducted by W., the solicitor of S., but H. was consulted repeatedly, and gave advice as to the sale, which was ultimately completed. On completion, H. was paid $2\frac{1}{2}$ per cent. on the purchase money. W., in his bill of costs, claimed the scale fee for negotiating the sale, which claim was resisted on the ground that the vendor had paid a commission to an estate agent. The Taxing Master allowed the scale fee, being of opinion that as the commission paid to H. was not a payment in respect of this particular transaction, but for general services, and would have been paid all the same if he had not intervened at all in the sale, it was not a commission within the meaning of the Solicitors' Remuneration Order, Schedule I., Part I., Rule 11:

Held, by NORTH, J., that if H. had not been called in at all in this transaction, the payment of the commission, which would in that case have been a payment entirely in respect of other work, would not have been a payment of commission within the rule, but that as H. had assisted in the negotiation he was paid for his assistance by the commission, although the commission also covered other work; that a commission, therefore, had been paid within the meaning of the rule, and that the scale fee for negotiation ought not to be allowed:

Held, by the Court of Appeal, that NORTH, J., had put a correct construction on the rule.

IN 1874 Sir Percy Shelley engaged Mr. Hankinson, a local surveyor, to act in the general management of his estate at Bournemouth, with a view to its development as a building property. His remuneration was to be $2\frac{1}{2}$ per cent. on the capitalised value at twenty-five years' purchase of the rents received on all leases granted during his agency, and $2\frac{1}{2}$ per cent. on the purchase money of all lands sold during the same period.

On the 23rd of May, 1884, Sir Percy telegraphed to his solicitor,

North, J.
1891.

Mr. Withall: "Most important proposal for purchase here—parties all at Bournemouth, and are compelled to require answer by Monday. Can you come here to-morrow, or Sunday, or Monday? Hankinson very ill and not allowed to receive letters."

Mr. Withall on the 24th went to Bournemouth, and conferred with Sir Percy and Lady Shelley as to negotiating the sale of a plot of twelve acres to the Conservative Land Society. On the same day he attended Mr. Bazalgette, the solicitor of the Society, and asked £1,600 per acre. On the 26th Mr. Bazalgette offered £1,200 per acre, which was not accepted. Mr. Withall then conferred with Sir Percy and Mr. Hankinson, and on the 27th attended a meeting of the Society, and agreed to accept £1,200 per acre, subject to restrictive covenants, the nature of which was to be defined by Mr. Hankinson. The terms were finally agreed on between him and the Society on the 1st of June.

Mr. Hankinson by affidavit stated as follows:—"The original offer was, I am informed and believe, made direct to the said Sir P. Shelley, and the negotiations were in the first instance conducted by his solicitor, Mr. Charles Withall. I was at the time recovering from an illness and unable to go to my office, but Mr. Withall attended me on one or two occasions in company with the said Sir P. Shelley and Mr. Bazalgette, the solicitor to the said Society, at my private house, and I assisted in the negotiations by preparation of plans and advising." On cross-examination he said: "I remember the sale in 1884 to the Conservative Land Society. I prepared plans for it in relation to the negotiations, pending the negotiation before the signing of the contract, and gave advice to Sir Percy and his solicitor in relation to the negotiations on almost every point that arose; for instance, as to what price should be asked, which would require local knowledge, which I possessed. I also advised that certain restrictions should be imposed as to building. I saw, and had letters from, Mr. Bazalgette, solicitor to the purchasers, pending the negotiations dealing with the points which arose. I also saw and corresponded with Mr. Withall thereon. Mr. Withall brought Mr. Bazalgette with him to my house on one occasion." On further examination he said: "I did nothing at all until Mr. Withall brought Mr. Bazalgette to me; that was the first I heard of it. After that, there was something about the price between me

and Mr. Bazalgette. I did not fix the price with Mr. Bazalgette of my own knowledge. I did not know who did."

On the completion of the sale Sir Percy paid Mr. Hankinson, according to the terms of his engagement, £360; being $2\frac{1}{2}$ per cent. on the purchase money.

The bill of Mr. Withall (who was dead) was now being taxed, and the question was whether he was entitled to be allowed the scale fee of £76 for negotiating the purchase. An objection having been taken to its allowance, the Taxing Master in his answer, after shortly stating the facts as to the negotiation, and the payment of the £360, said: "It appeared to me that this was not a payment in respect of this particular sale, which the surveyor neither effected nor negotiated, but for general services rendered as a retained estate agent and manager, who, instead of receiving an annual salary, was paid by a percentage, an arrangement calculated to give him a special interest in promoting the development of the estate, and that it was not such a payment as would disentitle the solicitor to his fee for a negotiation which he was specially retained to conduct, and did, in fact, successfully carry into effect, fixing the price and completing the contract. The position of the surveyor in regard to the sale was, in fact, that of a salaried agent, though, instead of an annual salary, he was paid by a commission; and I considered that the circumstances were not such as made the payment to him a payment to an 'estate agent or valuer' within the meaning of the Remuneration Order, Rule 11.

"The magnitude of the fee paid to Mr. Hankinson, which is so greatly in excess of the ordinary surveyor's fee, is of itself sufficient to show that it was not made in respect of this particular sale, but for general services; and the agreement under which he made and was paid his commission would have equally entitled him to it, even if he had never been consulted about the sale or interfered in it."

The representative of Sir Percy Shelley applied to vary the certificate.

The summons was heard before MR. JUSTICE NORTH on the 29th of April, 1891.

. Cozens-Hardy, Q.C., and D. L. Alexander, for the summons:—

The conditions under which a scale fee is payable to the solicitor

North, J.
1891.

Ante, p. 667.

for negotiating the sale are not applicable, because the conditions under which it is payable were not performed. The solicitor did not perform the positive conditions necessary to entitle him to scale fee of arranging the sale and the price and terms and conditions thereof. Nor was the negative condition performed, that no commission should be "paid by the client to an auctioneer or estate or other agent:" *In re Macgowan* (1). Here Sir Percy Shelley's general agent took a substantial part in the work of negotiating, and was paid by commission in respect of this and other work. We admit that Mr. Withall was entitled to a *quantum meruit*, and the matter may be referred back to the Taxing Master to fix such amount.

Warrington, for the respondents:—

The negotiation was, in fact, carried out by the solicitor. And the commission paid to the estate agent, though measured to some extent by the sale price of the property in question, was really paid in respect of other work; it was, in effect, part of a salary.

NORTH, J.:—

I think in this case the Taxing Master has made a mistake. The question arises under the 11th Rule, which says: "The scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate, or other agent." [His Lordship read the passages from Mr. Hankinson's affidavit and cross-examination, set out above, and proceeded:—]

It seems to me, therefore, clear that Mr. Hankinson did take part in what went on with respect to the negotiations. Another party found the purchaser. I do not think that in itself material. If a vendor takes a proposed purchaser to his solicitor, and says: "This man wants to buy my property; you negotiate the terms of it with him for me;" the solicitor might earn the fee, although he did not find a purchaser in that sense. I do not think the not finding the purchaser is the material point. But, in point of fact, what Mr. Withall did was to a certain extent to conduct the negotiation.

In my opinion he did not entirely conduct the negotiation, and did not earn the fee. There were certain points he could not carry out himself. He was in communication with Mr. Hankinson, and a correspondence took place between them; and further than that, the arrangement came to was for a sale on terms and conditions which were settled by Mr. Hankinson. Under these circumstances, in my opinion, Mr. Hankinson was taking part in the negotiations and doing work for which beyond all question, but for the existing arrangement as to the mode of payment, he was entitled to be paid in some way, whether by commission or otherwise. If he had been called in on this occasion alone, he might or might not have been paid by commission. I do not think, if he had been paid by commission, he would have received so large a commission as he got in the present case. But I do not see any reason to doubt that he might have been paid by commission. Although the negotiations were to a certain extent conducted by Mr. Withall he did not entirely conduct them, and they were partly conducted by Mr. Hankinson.

Then it was said the words of the latter part of the rule prevent the fact of Mr. Hankinson having been consulted to some extent from applying to this case, because it was said the solicitor arranged the terms of the contract and no commission was paid in respect of the sale by the client to any auctioneer or estate or other agent. In my opinion commission was paid in respect to this very matter to Mr. Hankinson, he being the estate agent. It is quite true that, if he had not been called in at all, he still would have been entitled to this commission in respect of other work. And if he had not been called in or consulted at all on this occasion, the fact that he received for other work a payment measured by the amount realised by this sale would not, in my opinion, have made the payment a payment of commission within the meaning of the rule. But he did part of the business that was done between the time the parties came together and the time the contract was completed; he took a material and essential part in it, which I will not say Mr. Withall could not have done without him if it had been left to him alone; but it was not, and he was obliged to get the assistance of Mr. Hankinson for the purpose. Under these circumstances Mr. Hankinson was paid for that work beyond all question, and the

C. A.
1891.

bargain was that he was to be paid a commission upon it. In my opinion it was not the less a commission because the sum paid covered other work done in respect of other matters. The Taxing Master in his answer to objections says: "No doubt a payment was made to a surveyor, and if it were a payment made entirely in respect of this transaction no question could arise," and he uses the phrase in two other passages in the answers. I do not think it is essential that the commission paid should have been paid entirely in respect of the transaction in question. If commission was paid in respect of that transaction I think it immaterial whether the commission covers other things done by the agent or not. In my opinion the Taxing Master ought not to have allowed the solicitor the price which is given as a payment for all the work when part of the work was not done by the solicitor, and when it is impossible to say that the whole of the work was done by him without the intervention of the estate agent, who was paid commission.

Under these circumstances I think that the Taxing Master was wrong in allowing the £76, the scale fee. On the other hand, I think Mr. Withall was entitled to some payment for what he did, and as to that I understand his right to make out his bill with regard to these matters is not disputed.

Withall's executors appealed from this decision. The appeal was heard on the 3rd of June, 1891.

Warrington, for the Appellant:—

I contend that this is not a commission within the Solicitors' Remuneration Order, Sched. I., Part I., Rule 11. To come within that rule the commission must be in respect of the particular transaction a remuneration in respect of the sale. The beginning of Rule 11 as to sales by auctions shows this to be the case. Here the commission was not paid as remuneration for services in respect of the sale; it would have been paid just the same if Hankinson had not been privy to the sale at all. It was really salary, not commission. The scale fee for negotiating is therefore payable.

Cozens-Hardy, Q.C., and *D. L. Alexander*, for the representatives of Sir Percy Shelley, were not called upon.

LINDLEY, J. :—

C. A.
1891.

I think that the construction Mr. Justice North put upon Rule 11 was the right one, and that the Taxing Master made a mistake in considering that the commission was not a commission within the meaning of the rule unless it was paid in respect of the particular sale. The London solicitor conducted the negotiation for the sale, in which he would require the assistance of a person with local knowledge. Mr. Hankinson gave his services about this very matter, and it may have been to a great extent owing to his advice that the negotiation was brought to a successful conclusion. He was paid for this, and paid by a commission, and it is nothing to the purpose to say that the commission was in part a remuneration for other services, and that Mr. Hankinson would have received it all the same if he had not taken any part in this sale. He did act in this sale and was paid a commission, and the case is within the scope and meaning as well as the words of Rule 11. The appeal will be dismissed.

BOWEN and FRY, L.JJ., concurred.

Solicitors : *Hays, Schmettau & Co.; Blake & Heseltine.*

In re PURCELL and LENEHAN; *Ex parte* BONASS.

(*By permission*, from 27 L. R. Ir. 375.)

M. R.
1891.
June 22, 29.

Solicitors' Remuneration Act, 1881—General Order, Schedule I., Part I.—
Vendor's solicitor—Costs of release of incumbrance.

The costs of obtaining the release of an outstanding incumbrance on property sold are not covered by the scale charge allowed to the solicitor for a vendor by Schedule I., Part I., of the General Order made under the Solicitors' Remuneration Act, 1881.

Re Emanuel and Simmonds (33 Ch. Div. 40) considered.

Ante, p. 332.

SUMMONS to review taxation.

This was an appeal from the decision of the Taxing Master disallowing certain items in a bill of costs furnished by Mr. Henry Bonass as solicitor to Mr. T. H. Purcell, on the sale of certain property. Mr. Bonass claimed and was allowed a fee of £30 10s.

M. R.
1891.

for the work done in making title and completing the business under Schedule I., Part I., of the General Order made under the Solicitors' Remuneration Act, 1881. The bill of costs also included several items in respect of the preparation and execution of a release of a charge on the property from the trustees of Mr. Purcell's marriage settlement. The Taxing Master disallowed these items, being of opinion that the fee of £30 10s. covered all charges in connection with the business, including charges for deeds of re-conveyance or release of incumbrances affecting the property sold prepared by the same solicitor.

Mr. William Kenny, Q.C., appeared in support of the appeal.

Mr. E. Cuming for the vendor.

Ante, p. 278.
Ante, p. 467.
Ante, p. 238.
Ante, p. 235.
Ante, p. 371.
Ante, p. 443.
Ante, p. 332.

The following cases were cited:—*In re Field* (1), *Ex parte Ferguson & Co. to Buckley* (2), *In re Lacy & Sons* (3), *Re Beck* (4), *Ex parte Lord Mayor of London* (5), *Re Gallard, Ex parte Harris* (6), *Re Emanuel & Simmonds* (7).

THE MASTER OF THE ROLLS:—

June 29.

Ante, p. 443.

The question raised here is not covered by authority. The case of *Re Gallard, Ex parte Harris* (8), cited by Mr. Cuming, is not in point. The question there arose in the Bankruptcy Court, and was simply whether, when the property of a bankrupt was sold subject to incumbrances, the solicitor of the trustee in bankruptcy was, under Rule 9 of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881, entitled to a percentage on the gross amount of the purchase-money, and not merely on the amount realised from the equity of redemption. It appears from the report that there was a re-conveyance by the mortgagee, and no separate charge made for it; but there was no argument or decision on that point.

The net question here is this: The solicitor for the vendor has charged the amount of remuneration allowed by Schedule I., Part I.,

- (1) 29 Ch. Div. 608.
- (2) 21 L. R. 1r. 392.
- (3) 25 Ch. Div. 301.
- (4) 24 Ch. Div. 608.

- (5) 34 Ch. Div. 452.
- (6) 21 Q. B. Div. 38.
- (7) 33 Ch. Div. 40.
- (8) 21 Q. B. Div. 38.

and asks in addition to be paid the costs of obtaining the release of an outstanding mortgage. I do not decide anything as to the rate of charge to be allowed for obtaining this release, but only the question whether the solicitor is entitled to the scale charge, and nothing more. The words of the schedule are as follows:—"For all charges, including charges for a negotiation by a solicitor, connected with a sale of property by private contract, or by auction, including preparation of contract and conditions of sale, deducing title and furnishing necessary searches, and perusing and completing conveyance."

These words are very wide, no doubt, but I am clearly of opinion that they do not cover the costs of obtaining the release of an outstanding incumbrance. It could never have been intended by the framers of the schedule that the scale of remuneration was to be the same whether there were or were not outstanding charges on the property to be sold which had to be released by separate deed. Such charges might be numerous.

The case of *Re Emanuel and Simmonds* (1) appears to be nearest *Ante*, p. 332. to the present case. The controversy there arose as to the remuneration to be paid for the preparation of a prior agreement for a lease under Part II. of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881. The solicitor prepared an agreement for a lease and a lease as well, and claimed the scale fee for the lease, and a separate fee for the agreement. The Taxing Master disallowed the separate charge for the agreement, and Pearson, J., and the Court of Appeal affirmed his decision.

Reliance was placed in argument upon the fact that agreements for leases were specially mentioned in Part II. of the Schedule, but both Courts held that "agreements for leases" there meant agreements for leases intended to be relied on as regulating the tenancy without any formal lease, and that the preparation of the agreement in the case, being intended to be followed by a lease, was "business connected with" the lease within the meaning of Rule 2 of the General Order, and could not be separately charged for.

That case would be an authority in Mr. Cuming's favour if it were analogous to the present case; but there is, in my opinion, no binding analogy between the two cases. The case of a preliminary

M. R.
1891.

agreement for a lease cannot apply to the case of an outstanding incumbrance on the property the subject of the sale.

COTTON, L.J., says : " I can quite understand that where a lease is granted there may be an agreement which, although it refers to the lease, is to be considered as a collateral matter, as a matter not amounting merely to a step in the negotiations for a lease, or providing for a step in the negotiations for a lease, but providing for something different. It must depend on the circumstances of each case whether an agreement is collateral or not. In the present case the agreement, in my judgment, is merely part of the negotiation for the lease which was afterwards granted, and, the transaction being complete, one charge must, in my opinion, cover all charges with reference to this agreement, as well as everything else connected with the granting of the lease or the negotiations for the lease. In my opinion, therefore, this appeal must be dismissed."

BOWEN, L.J., says : " It does not follow necessarily, as a matter of law or as a matter of business, that a document which is called an agreement for a lease may not contain stipulations with regard to subject-matter so separate and so distinct as that those stipulations form no part of the agreement for the lease, but involve transactions outside. Looking at the matter from that point of view, the difficulty suggested by the appellant's counsel as to cases of reversionary leases and surrenders ceases to present a difficulty. It may well be that business done with regard to an agreement for a reversionary lease is a separate business totally distinct from the reversionary lease itself, and may be separate from it for the purpose of discussing the remuneration of the solicitor. The same observation applies to the case of a surrender. But it by no means follows that no collateral stipulations are part of the business which culminates in a lease."

This decision is no authority contrary to the view I have taken, but rather in accordance with it, for it would appear from the observations I have quoted that if there had been a surrender or anything else collateral with the lease itself it would have been treated as a separate matter.

A sale might take place subject to an outstanding incumbrance. When that is not done, and when the incumbrance is separately dealt with by a deed of release as here, I regard the release as a

distinct matter; and am of opinion that the costs of getting in this incumbrance on the property sold is not included in the scale charge. That is all I decide. It was for the Taxing Master to say whether the work done was necessary, and what was the amount to be allowed for it.

M. R.
1891.

Solicitor in person: *Mr. Henry Bonass.*

Solicitor for T. H. Purcell: *Mr. A. Devereux.*

INDEX.

A

	Page
ABORTIVE NEGOTIATIONS —Lease	546
<i>See SOLICITORS' REMUNERATION ACT. 20.</i>	
ABORTIVE SALE —Alteration of conditions settled at Chambers— <i>Costs of preparing and printing—Advertisements—Solicitor having carriage.</i>] In an action for dissolution of a partnership, by the decree on further consideration, the plaintiff and defendants were declared entitled to their costs, and all subsequent costs, and the premises where the business was carried on, together with the stock-in-trade, were ordered to be sold. By a subsequent order the premises were directed to be sold out of Court. The solicitor for the plaintiff proceeded to sell, and the conditions of sale were settled at chambers. By the second condition of sale it was provided that if the amount offered should be deemed insufficient the vendors collectively reserved the right to withdraw the property offered for sale. It came to the knowledge of the solicitor for the plaintiff that <i>M.</i> , one of the defendants, alone was in a position to buy the property, and, in order to prevent the sale being placed in his hands, he proposed to the other partners and to a mortgagee to alter the conditions of sale, so that any of the vendors might withdraw it. He failed to obtain a consent for this, and the sale having been advertised, the solicitor for the plaintiff altered the conditions of sale, acting under the advice of counsel, but without leave of the Court. The sale took place, and a price was offered which the Court deemed insufficient, and refused to confirm the sale. The plaintiff was then adjudicated a bankrupt, and the further conduct of the proceedings passed over to the assignees. The solicitor for the plaintiff taxed his costs, and the taxing officer disallowed the items for preparing and printing the conditions of sale and for the advertisements :— <i>Held</i> , on appeal from the taxing officer, that the solicitor for the plaintiff was, under the circumstances, entitled to the costs, notwithstanding the irregularity in altering the conditions without leave of the Court, as the costs were <i>bona fide</i> incurred. <i>Kearse v. Doherty</i> , 21 L. R. Ir. 381	448
<i>See ATTEMPTED INEFFECTUAL SALE.</i>	
ABSTRACTS OF TITLE —Perusing	273
<i>See SOLICITORS' REMUNERATION ACT. 48.</i>	
ACCOUNT —Perusal of Receiver's Account	598
<i>See RECEIVER'S ACCOUNT.</i>	
— Matter of account referred to County Court	600
<i>See COUNTY COURT. 2.</i>	
ACCOUNTANT —Employed in arrangement by resolution of creditors	324
<i>See ARRANGING DEBTOR.</i>	
ACTION TO RECOVER POSSESSION OF LAND —1. Overholding Tenant— <i>Joinder of Claim for Mesne Rates—Land Law (Ireland) Act, 1881, sect. 51—County Court Jurisdiction.</i>] An action was brought in a Division of the High Court of Justice to recover possession of lands on the expiration of a lease for thirty-one years, at a yearly rent of £40, under which the lands had been held, the writ of summons being issued before the passing of the Land Law (Ireland) Act, 1881. By his statement of claim, delivered in October, 1881, the plain-	

ACTION TO RECOVER POSSESSION OF LAND—continued.

Page

tiff claimed to recover possession and mesne rates. A consent for judgment for possession and a sum for mesne rates was given by the defendant :—*Held*, that the action for possession and mesne rates might have been brought in the County Court; and that the plaintiff was, therefore, by Sec. 51 of the Land Law (Ireland) Act, 1881, disentitled to costs. *Greville v. Kirk*, 10 L. R. Ir.

41

227

2. — **Writ of Restitution**—*Rent under £100 per annum—Land Law (Ireland) Act, 1881—Landlord and Tenant Act, 1860.*] When a holding at a rent under £100 per annum has been evicted for non-payment of rent the tenant or other party having a specific interest in the holding is entitled to a writ of restitution under 23 & 24 Vic., c. 154, without paying the costs of the action. *Scully v. Mandeville*, 10 L. R. Ir. 327

231

ADDITION TO BILL OF COSTS—Taxation of Costs—Party and party—Addition to bill after lodgment for taxation—Accidental omission—Orders and Regulations, 12th December, 1868.] Rule 8 of the Orders and Regulations of the 12th December, 1868, for the conduct of business in the offices of the Taxing Masters of the Court of Chancery in Ireland, applies to costs as between party and party as well as to those between solicitor and client. *O'Meara v. D'Esterre and Cox*, 21 L. R. Ir. 135

415

ADMIRALTY—1. Marshal's Travelling and Hotel Expenses—Auction Fee—Appraisement subsequent to Sale.] A vessel was sold by order of the Court at Youghal. After the sale she was appraised. The marshal travelled to Youghal to attend the sale, but did not arrive till it was over :—*Held*, that the marshal, though it was irregular and a nullity to have the appraisement after the sale, was justified in making the vessel over to the purchaser; that the marshal's travelling and hotel expenses should be allowed; that the charges of a person employed by him to make an inventory should be disallowed, as the marshal should do his duty in person; that the travelling expenses of the auctioneer should be allowed and the appraisement fee disallowed. "*The Queen*," 3 Ir. L. T. 101

16

2. — **Costs of Consent to admit Documents—Expenses of bringing up and preparing Evidence of Witnesses not examined—Discretion of Taxing Officer—Costs and Expenses of Witness detained in the country—Affidavit as to Witnesses.**] A consent to admit documents having been tendered by the defendant and declined, the documents were proved by a witness :—*Held*, that the defendant having got the costs of the witness was not entitled to the costs of the consent. Costs of certain witnesses, preparing their evidence for counsel, and bringing them up for the hearing, when they were not examined, the opposite party having offered to examine them *de bene esse* or by affidavit, disallowed. In a salvage suit parties are not bound to give their evidence by affidavit. The number of the witnesses and the materiality of the evidence in the taxation of costs in the Admiralty Court are questions in the discretion of the officer. The costs of the detention, wages, and travelling expenses of a witness detained in the country for the purposes of the suit, will be allowed on taxation within proper limits and in a proper case, but not when his evidence is immaterial or might have been taken by affidavit. The practice of the Admiralty Court is, that in taxing witnesses' expenses an affidavit is not made respecting them, unless the party objecting to them requires it. Costs of such an affidavit disallowed. "*The Rivoli*," 4 Ir. L. T. 454

29

ADVERTISEMENTS—1. Service of Summons and Plaint on Public Company—Substitution of Service.] A plaintiff having obtained an order to substitute service against a corporation aggregate is not entitled to the costs

ADVERTISEMENTS—*continued*

Page

- of advertisements inserted in Irish papers under the provisions of the 33rd section of the Irish Common Law Procedure Act, unless the order for substitution of service direct such advertisements. *Mape v. The London and North-Western Railway Company*, I. R. 1 C. L. 563 14
2. — **Scale of Charges—Printing.**] The scale of charges for printing newspaper advertisements is at the uniform rate of 6d. per line, and the scale in Madden's Land Judges' Practice, third edition, p. 470, is repealed. *In re Roache's Estate; Ex parte M'Grath*, 25 L. R. Ir. 256. 616
- On sale in Court 448
See ABORTIVE SALE.
- Sale by mortgagee 193
See SALE BY MORTGAGEES UNDER POWER OF SALE.
- AFFIDAVITS**—Settling 634
See COUNSEL. 8.
- AGREEMENT AS TO REMUNERATION.**
See SOLICITORS' REMUNERATION ACT. 1 and 2.
- AGREEMENT FOR A LEASE**—Followed by preparation and completion of lease.
See SOLICITORS' REMUNERATION ACT. 19 and 21.
- ALTERATION**—None allowable in bill of costs after lodgment 415
See ADDITION TO BILL OF COSTS.
- In conditions of sale settled at Chamber 448
See ABORTIVE SALE.
- AMOUNT RECOVERED.**
See COMMON LAW PROCEDURE ACT, 1856, s. 97, and PAYMENT INTO COURT.
- AMOUNT SUED FOR** 234
See CIVIL BILL COSTS.
- APPEAL**—Number of counsel allowed in Court of Appeal.
See COUNSEL. 1 and 2.
- APPRAISEMENT FEE** 16
See ADMIRALTY. 1.
- APPROVAL FEE**—Solicitor not entitled to, where he has been investigating the title, and gets the general costs relating to the matter which is the subject of the deed 23
See REVIEWING TAXATION.
- ARBITRATION**—Terms of submission may exclude operation of 97 Section of Common Law Procedure Act, 1865 10
See COMMON LAW PROCEDURE ACT, 1856. 4.
- ARRANGING DEBTOR**—Arrangement turned into Bankruptcy—*Accountant and Solicitor employed in Arrangement by resolution of Creditors—Costs—Taxation—Schedule to General Orders of 1872—Practice.*] A trader presented a petition for arrangement, and obtained the usual protection order. At the first private sitting of creditors, it was resolved that a certain firm of accountants should investigate the petitioner's affairs. The accountants accordingly received certain sums out of the estate, and paid thereout certain sums to the petitioner's solicitor, on account of costs, and retained certain sums for their own charges. The arrangement was subsequently turned into bankruptcy, and the accountants paid to the assignees the balance remaining, after deducting the sums paid and retained by them as above mentioned. Upon the application of the assignees, MILLER, J., ordered the accountants to bring in the balance of the moneys received by them without any deductions, giving them liberty, within a month, to submit their bills of charges to the Registrar, to

ARRANGING DEBTOR—continued.

Page

inquire whether any charges or costs had been properly incurred, either by them as accountants, or by the solicitor, in relation to and for the benefit of the estate of the bankrupt, and that the assignees should out of the funds in Court pay the accountants and solicitor the sums so ascertained to be properly and justly payable to them. On appeal, the majority of the Court of Appeal (Lord ASHBOURNE, C., and FITZGIBBON, L.J.; BARRY, L.J., *dissentiente*) varied the order below by directing the Registrar of the Bankruptcy Court to inquire whether any charges or costs had been properly incurred, either by them, as accountants, or by the solicitor, in relation to the estate of the bankrupt, or the arrangement with his creditors proposed by him, and to tax said bills of costs and charges as if the arrangement had been carried out, but according to the scale of costs and charges under the General Orders of 20th December, 1872, and that the accountants should have credit for the amounts so ascertained to be properly payable in respect of the costs and charges aforesaid, and should lodge the balance in Court. *Per* BARRY, L.J., the accountants were entitled to be paid as on a *quantum meruit*, and the scale in the schedule to the General Orders did not apply: *In re O'Callaghan*, 19 L. R. Ir. 32 . 324

ASHBOURNE'S (LORD) ACT—Costs of sale under 475

See SOLICITORS' REMUNERATION ACT. 52.

ATTEMPTED INEFFECTUAL SALE.

See SOLICITORS' REMUNERATION ACT. 3, 4, 5, and 35.

ATTENDANCE.—1. *At Trial*—*Trial in County where Solicitor does not usually practise*—*Taxation of Costs*—*Between party and party*—*General Order II. (June, 1882), Schedule, item. 29.*] The solicitor for the successful party can only be allowed, as between party and party, the fees prescribed in General Order II. (June, 1882), item 29, for attending a trial of the action, though the place of trial be a county of which he is not a practitioner: *Martin v. Nixon*, 22 L. R. Ir. 138 423

2. — *At Trial*—*Solicitor and Client*—*Solicitor attending trial in County in which he does not practise*—*General Orders, 1854, Schedule, items 100, 101*—*Gen. Orders, 1882, Schedule, item 29*—*Ejectment*—*Case sent to Counsel for advice on Settlement of Writ.*] A solicitor attending on a record for trial at Assizes in a county where he does not usually practise, is entitled, upon taxation between solicitor and client, to £2 2s. for each day necessarily occupied, irrespectively of the number of days the case may be actually at hearing, or of its being settled without a trial. The allowances Nos. 100 and 101 in the Schedule to the General Rules of 1854, as between solicitor and client, are not altered by the orders as to costs under the Judicature Act. A fee to counsel for advising as to whether an ejectment will lie, and who are the necessary parties to be made plaintiffs, may, in a proper case, be allowed, as between solicitor and client: *M'Namara v. Malone*, 18 L. R. Ir. 269 . 343

3. — **Evidence of**—1 & 2 *Geo. IV., c. 53, s. 49*—4 *Geo. IV., c. 61, s. 19.*] On taxation, as between solicitor and client, it is not necessary that the solicitor should prove attendances on his client by contemporaneous entries in his books, provided that he give other satisfactory evidence thereof. *In re Bray Electric Tramway Co.*, 23 L. R. I. 116 531

— On client in the country 23
See REVIEWING TAXATION.

— At sale by mortgagees 193
See SALE BY MORTGAGEES.

— Not connected with conveyancing—Preparing scheme for labourers' cottages 493
See SOLICITORS' REMUNERATION ACT. 17.

ATTENDANCE — <i>continued.</i>	Page
— At Assizes—Allowance for	323
See WITNESS MEDICAL.	
AUCTIONEER —Travelling expenses of	16
See ADMIRALTY. 1.	483
See SOLICITORS' REMUNERATION ACT. 37.	

B

BONDS —Collectors' and contractors' prepared for Town Commissioners	498
See SOLICITORS' REMUNERATION ACT. 7.	
BRIEF AT HEARING —Counsel's fees	181
See ELECTION PETITION. 2.	
BRIEFING —At Trial— <i>In Court of Appeal—Documents—Report of Judgment.</i>]	
Item 75a applies to a brief in the Court below as well as in the Court of Appeal; but what should be allowed for such brief, and for briefing documents is a matter for the Taxing Master. In the Court of Appeal, as a general rule, the cost of briefing the report of the judgment of the Court below should be allowed. <i>Jessop v. Cusack</i> , 25 L. R. Ir. 244	634
— Copies of deeds	72
See COPIES OF DEEDS.	
— Documents	99
See COUNSEL. 11.	
BRIEFS —Preparing in long vacation—Matter settled	131
See NEW TRIAL MOTION.	

C

CARRIER —Action of tort against, not “disconnected with contract”	11
See COMMON LAW PROCEDURE ACT , 1853, s. 243. 5.	
— Entire cause of action against, arising in civil bill jurisdiction.	
See COMMON LAW PROCEDURE ACT , 1856, s. 97. 1, 2.	
CASE TO ADVISE PROOFS —1. Undefended Suit.] In undefended suits by cause petition, the costs of a case to counsel to advise proofs will not be allowed on taxation between party and party, except under very special circumstances. <i>Chapple v. Burke</i> , I. R. 3 Eq. 270	18
2. — Undefended Suit.] Under the Chancery Act, 1867, a case to direct proofs in a cause in which no answer has been filed will tax between party and party. <i>Fry v. James</i> , I. R. 4 Eq. 255	21
3. — Further case to advise proofs—A further case to advise proofs may under special circumstances be allowed. <i>Leclerc v. Green</i> , I. R. 4 C. L. 388	41
And see COUNSEL'S FEES.	
CASE TO ADVISE ON SETTLEMENT OF WRIT.	
See ATTENDANCE 2 and COUNSEL 4.	
CASE TO ADVISE TRUSTEES —Not included in Gen. Ord. 18th April, 1884	386
See SOLICITORS' REMUNERATION ACT. 8.	
CERTIFICATES —To entitle plaintiff to full costs.	
See COMMON LAW PROCEDURE ACT , 1853, s. 243. 1, 2, 3.	
CHANGE OF INVESTMENT —Statements for information of client—directions to trustees	386
See SOLICITORS' REMUNERATION ACT. 8.	

	Page
CHANGE OF SOLICITOR —After attempted ineffectual sale—Subsequent effectual sale	329
<i>See SOLICITORS' REMUNERATION ACT.</i> 4.	
CIVIL BILL COSTS — <i>Amount sued for greater than recovered.</i>] Plaintiff's attorney entitled as between solicitor and client to costs on amount sued for. <i>Simpson v. Wilson</i> , 17 Ir. L. T. 546	234
— Costs payable between party and party—Tender of debt after service	151
<i>See TENDER OF DEBT.</i> 1.	
— Fee for instructions	226
<i>See TENDER OF DEBT.</i> 2.	
CIVIL BILL EJECTMENT — <i>Posting.</i>] The plaintiff is entitled to the costs of posting a civil bill ejectment for non-payment of rent when they have been necessarily incurred. <i>Palmer v. Locke</i> , 21 Ir. L. T. R. 32	411
CIVIL BILL JURISDICTION —Amount recovered in action in Superior Court. <i>See COMMON LAW PROCEDURE ACT</i> , 1856, s. 97, and <i>COUNTERCLAIM</i> .	
— In ejectment—Land Law (Ireland) Act, 1881. <i>See ACTION TO RECOVER POSSESSION OF LAND.</i> 1, 2.	
"CLIENT"—Solicitor acting for mortgagor and mortgagee	618
<i>See SOLICITORS' REMUNERATION ACT.</i> 2.	
— Lessee liable to pay lessor's solicitor	348
<i>See SOLICITORS' REMUNERATION ACT.</i> 9.	
— Notice of election to "client." <i>See SOLICITORS' REMUNERATION ACT.</i> 9, 10, 11, 12, 14.	
COLLECTORS' BONDS —Prepared for Town Commissioners	498
<i>See SOLICITORS' REMUNERATION ACT.</i> 7.	
COMMON LAW PROCEDURE ACT, 1853, ss. 33 and 34	14
<i>See ADVERTISEMENTS.</i>	
COMMON LAW PROCEDURE ACT, 1853, s. 243 — 1. <i>Certificate</i> — <i>Bona fide action</i> — <i>Judgment by default</i> — <i>Common Law Procedure Act, 1856, s. 97.</i>] Action for the conversion of the alluvial soil of the bank of a river alleged to be the plaintiff's; judgment by default, and damages assessed by a jury at £3:— <i>Held</i> , that the action having been brought <i>bona fide</i> for the purpose of trying a right, the circumstance of the defendant not defending it, and thus waiving the question, did not disentitle the plaintiff to full costs. <i>Hickey v. O'Connor</i> , I. R. 8 C. L. 509	133
2. — <i>Certificate</i> — <i>Judgment by default</i> — <i>Common Law Procedure Act, 1856, s. 97.</i>] (1) Although judgment has passed by default the Court has jurisdiction to grant the plaintiff a certificate under s. 97 of the <i>Common Law Procedure Act, 1856</i> . (2) Where there has been no trial, the Court has no jurisdiction to grant the plaintiff a certificate either under s. 126 or s. 243 of the <i>Common Law Procedure Act, 1853</i> ; whether the plaintiff is entitled to full costs under s. 243 is a matter to be determined by the Taxing Master, as incident to the taxation. <i>Hickey v. O'Connor</i> (I. R. 8 C. L. 509) dissented from. <i>O'Halloran v. Garvey</i> , I. R. 9 C. L. 551	167
3. — <i>Certificate</i> — <i>Detinue</i> — <i>Nominal damages.</i>] The plaint contained the money counts and a count in detinue; and the plaintiff obtained a verdict for £40 on the former, and for 1s. damages on the latter, but did not get a certificate for costs: the plaintiff's verdict on the money counts having been afterwards changed by the Court into a verdict for the defendant:— <i>Held</i> (1), that the plaintiff was entitled to no more than half costs on the count in detinue; and (2) that the costs in respect of the money counts ought not to be taxed against the defendant, who ultimately succeeded on those counts. <i>Birmingham v. Billing</i> , I. R. 9 C. L. 287	147

COMMON LAW PROCEDURE ACT, 1853, s. 243—continued.

Page

4. — Judgment for £20—*Gen. Ord. VIII., r. 3—Practice.*] A judgment for £20, exclusive of costs, entered, by leave of the Court, under Gen. Ord. XIII., r. 1, after appearance, carries only such costs as are allowed by Gen. Ord. VIII., r. 3. *Long v. Fitzgibbon*, 20 L. R. Ir. 12 : app. 15 . . . 382
5. — Cause of action disconnected with contract—*Action against carriers.*] In an action against carriers for non-delivery, though the plaintiff frame his plaint in tort, the action will not be considered to be grounded on a wrong disconnected with contract, so as to entitle him to full costs, under the 243rd section of the Common Law Procedure Act (Ireland), 1853. *O'Sullivan v. Dublin and Wicklow Railway Company*, I. R. 2 C. L. 124 . . . 11
- Joinder of counts in contract and tort—Payment into court.
See PAYMENT INTO COURT.

COMMON LAW PROCEDURE ACT, 1856, s. 97—1. *Railway Co. — Cause of action within Civil Bill jurisdiction—Costs.*] The 97th section of the Common Law Procedure Act, 1856, depriving a plaintiff of costs, applies only when the parties reside within the same civil bill jurisdiction where the entire cause of action has arisen. The plaintiff, being away from the county in which he resided, contracted with a certain railway company, which plied between the county in which he then was and his home, and had places of business in both counties, to carry certain goods home for him. The goods were lost in the transit:—*Held*, in an action of *assumpsit* against the railway company for the non-delivery of the goods, that this was not a case in which the parties resided within the same civil bill jurisdiction in which the cause of action had arisen; and that the plaintiff was not, therefore, deprived of his right to costs by the fact that he had recovered but £10 in the action. *Crowder v. Irish North-Western Railway Company*, I. R. 4 C. L. 371 . . . 19

2. — *Railway Co. — Entire cause of action—Costs.*] A railway company "resides" (for the purposes of the C. L. P. Act, Ir., 1856, s. 97) within the jurisdiction of the Civil Bill Court of a county in which it has a station. To disentitle a plaintiff to costs under that section, the entire cause of action must arise within the civil bill jurisdiction where the parties reside; and if a contract be entered into outside the jurisdiction to carry to a place within it, the plaintiff will not be disentitled to costs, though the breach of the contract occurred within the jurisdiction. Cases as to substitution of service distinguished. *McMahon v. North-Western Railway Company*, I. R. 5 C. L. 200 . . . 67

3. — *Un defended action—Judgment by default—Amount recovered not exceeding £20—Judicature Act, 1877, s. 53—Order VIII. (April, 1878), rule 2—G. O. XII., r. 3.*] The 97th section of the Common Law Procedure Act, 1856, has not been repealed by the 53rd section of the Judicature Act, and remains in force with respect to the costs as well of undefended actions as of those tried before a jury. The effect of Order VIII., rule 2, of April, 1878, is merely to ascertain the amount of costs in actions where judgment is marked by default, in those cases in which a plaintiff is entitled to costs. In an action upon a bill of exchange for a sum under £20, both parties resided within the civil bill jurisdiction in which the cause of action arose, and there was admittedly no grounds for holding that the case was one fit to be tried in the superior courts. Judgment having been allowed to go by default:—*Held*, by the Exchequer Division and by the Court of Appeal, that the 97th section of the Common Law Procedure Act, 1856, disentitled the plaintiff to costs. *Lapsley v. Blee*, 6 L. R. Ir. 155, 161 . . . 200

COMMON LAW PROCEDURE ACT, 1856, s. 97—continued.

Page

4. — Arbitration—Award of £15—Costs to follow event of award—Parties contracting themselves outside the Act.] An action was brought for breach of covenant in an indenture of apprenticeship, both parties residing in the same civil bill jurisdiction. The matter was by consent (which was made a rule of Court) referred to arbitration, judgment to be marked for such sum as the arbitrators should award, and the plaintiff to be entitled to the costs if the award should be in his favour for any sum of money. The arbitrators awarded the plaintiff £15 :—Held, that the agreement excluded the operation of the 97th section of the C. L. P. Act, 1856. <i>Lang v. Eakin</i> , 1 Ir. L. T. 631	10
COMPROMISE AFFECTING COSTS—Ejectment	194
<i>See HIGHER AND LOWER SCALE.</i>	
COMPULSORY PURCHASE.	
<i>See LANDS CLAUSES CONSOLIDATION ACT, 1845.</i>	
CONDITIONS OF SALE.	
<i>See ABORTIVE SALE and SOLICITORS' REMUNERATION ACT. 5, 32, 35, and 49.</i>	
CONSULTATIONS—Principles on which costs of are allowed. <i>Smart v. Verdon</i> , 9 Ir. L. T. 598	153
<i>And see COUNSEL'S FEES.</i>	
CONTRACTORS' BONDS—Prepared for Town Commissioners	498
<i>See SOLICITORS' REMUNERATION ACT. 7.</i>	
CONVEYANCE—Costs of perusing and completing—Partition action	316
<i>See SOLICITORS' REMUNERATION ACT. 44.</i>	
CONVEYANCING BUSINESS.	
<i>See SOLICITORS' REMUNERATION ACT. 6, 7, 8, 17, and 30.</i>	
— Costs of conveyancing business in an action.	
<i>See SOLICITORS' REMUNERATION ACT. 41 and 42.</i>	
COPIES OF DEEDS—Costs.] No solicitor is bound to send original deeds to counsel. It is his duty to his client to send merely copies. Copies of deeds sent with instructions to prepare a petition should not be utilised for a brief on the hearing of the case, but the deeds should be briefed. The costs of such copies will be allowed on taxation. <i>In re Beamish's Trusts</i> , 5 Ir. L. T. 104	72
CORPORATION AGGREGATE—Substitution of service	14
<i>See ADVERTISEMENTS. 1.</i>	
CORRESPONDENCE—Prior to filing petition—Costs of	91
<i>See RENEWABLE LEASEHOLD CONVERSION ACT.</i>	
--- Application for debt.	172
<i>See LETTER.</i>	
COSTS OF TAXATION—Rule as to where more than one-sixth is struck off	23
<i>See REVIEWING TAXATION.</i>	
<i>See SUBSTITUTION OF SERVICE.</i>	
COSTS OF TRIAL	557
<i>See TRIAL.</i>	
COUNSEL—1. Fees—Between party and party—General principles as to—Number of briefs in Court of Appeal—Fees to professional witnesses.] 1. In estimating the amount of fees to counsel the Taxing Master should always have regard to the difficulty and complication of the questions of law and fact involved in the case, and the importance of it to the parties. The fees <i>bona fide</i> paid by a solicitor to counsel, and fairly required by the magnitude or complication of the cause, ought not to be reduced, but should be allowed on taxation between party and party. 2. Although two counsel only are heard in the Court of	

COUNSEL—continued.

Page

Appeal, the costs of three counsel in that court should be allowed on taxation between party and party, where the difficulty and importance of the case render it proper to retain them ; particularly in cases where three counsel had been allowed on taxation between party and party in the Court below. The daily fee allowed to a professional witness on taxation between party and party is not necessarily limited to £3 3s. In this case a fee of £5 5s. a-day was allowed to an engineer and architect of eminence employed under the direction of the Court. *Robb v. Connor*, 1 R. 9 Eq. 373 . . . 135

2. — Fees—*Appeal*.] The costs of a third counsel allowed in the Court of Appeal when three have been allowed in the Court below. *Jessop v. Cusack*, 25 L. R. Ir. 244 . . . 634

3. — Fees—*Case to advise proof—Fees on hearing of cause—Refresher fees—Consultation fees—General Order XII., 1868.*] Where in a suit of great magnitude and complexity, to set aside a deed as fraudulent and void—fees of fifteen guineas on a case for direction of proof, fifty guineas on the brief for the hearing, and ten guineas a day refreshers were paid to senior counsel for the plaintiff ; and it appeared that the fee paid on the case for proofs was fairly required by the magnitude and complication of the cause, but that the fees of fifty guineas and ten guineas respectively were paid by the solicitor rather as special fees in order to secure the services of particular senior counsel than as the result of his own estimate of what would be adequate and required by the difficulties and nature of the case:—*Held*, that on taxation between party and party, the fee of fifteen guineas on the case for proofs should be allowed ; but that the fees of fifty guineas and ten guineas should be reduced, and had been properly reduced by the Taxing Master to twenty-five guineas and five guineas respectively. On a taxation of costs each item should be separately dealt with ; and so in estimating the amount to be allowed as a fee to counsel for direction of proofs, the Taxing Master should not take into consideration the amount allowed for settling and revising the plaintiff's bill in the cause, nor the fee paid on a consultation required on advice of proof—which latter fee, moreover, is not taxable between party and party. *Dyott v. Reade*, 10 Ir. L. T. R. 110 . . . 157

4. — Fees—*Settlement of Writ of Summons and Joinder of Issue.*] The taxing officer has discretionary power to allow, as between party and party, fees to counsel on (a) settlement of writ of summons ; settlement of reply, though the latter is simply a joinder of issue on the preceding pleading. *Tisdall v. Richardson*, 20 L. R. Ir. 199 . . . 395

5. — Fees—*Retainer.*] A retaining fee of £10 10s. allowed as solicitor and client costs. *Smart v. Verdon*, 9 Ir. L. T. 598 . . . 153

6. — Refreshers.] Refreshers of £8 8s. to senior, and £5 5s. to junior, counsel allowed in an exceptional case. *Jessop v. Cusack*, 25 L. R. Ir. 244 . . . 634

7. — Refreshers.] A refresher to counsel on a motion will not be allowed unless certified by the Court. *In re Mortimer*, 1 R. 4 Eq. 96 . . . 23

8. — Settling interrogatories and affidavits.] In an exceptional case a fee to senior counsel for settling interrogatories and affidavits may be allowed. *Jessop v. Cusack*, 25 L. R. Ir. 244 . . . 634

9. — Advice of Counsel before instituting motion—*Motion for attachment.*] The costs of procuring the advice of counsel to institute a motion to attach a person for contempt of Court are not taxable against such person as party and party costs. *Lynch v. Macan* (2), 26 L. R. Ir. 385 . . . 648

10. — Advice of Counsel before instituting motion—*Motion for discovery.*] The costs of procuring the advice of counsel prior to the institution of a

COUNSEL—continued.

Page

motion are not taxable as party and party costs of the motion. Such costs are "preliminary to," not costs "of," the motion. *Semble*, the word "proceedings" in Gen. Ord. X., r. 12 (April, 1878), means *direct* proceedings towards the judgment in the action, and does not include collateral proceedings, such as a motion. *Lynch v. Macan* (1), 26 L. R. Ir. 385 . . . 645

11. — **Three Counsel—Party and party—Briefs of documents.**] The bill having been dismissed with costs after a hearing of fourteen days in a suit in which nineteen individuals and two companies—who had to a great extent a common case—were defendants, and some of them had justifiably answered separately, and had severally appeared by three counsel, two only of whom were heard for each defendant or set of defendants, the Court refused in the instance of an individual defendant to review the taxation whereby the costs of the third counsel were disallowed by the Taxing Master as between party and party. (2) Where one party by his pleading puts in issue documents which the other may reasonably expect will be read in evidence, and he, accordingly, has them briefed to his counsel, the Taxing Master ought, in the exercise of his discretion, and having regard to the probable materiality and relevancy of those documents to the case as pleaded, to allow the costs of the brief containing them, if he considers that the party was justified in having them briefed, even though they were not read in evidence at the hearing. *Haslam v. O'Connor*, I. R. 6 Eq. 615 . . . 99

12. — **Three Counsel—Consultation between two junior counsel—Difference between English and Irish practice.**] The Court will not interfere with the discretion of the taxing officer unless a question of principle is involved, or in an extreme case. Circumstances under which fees for consultation between two junior counsel were allowed, while the Court differed as to whether the case warranted the employment of three counsel. *Thompson v. Bolton*, 22 Ir. L. T. R. 96 . . . 472

13. — **Three Counsel—Inquiry at Chambers adjourned into Court.**] The costs of three counsel will not be allowed, as between party and party, on an inquiry at chamber adjourned into Court. *In re MacIver, deceased; MacIver v. Harbison*, 21 L. R. Ir. 241 . . . 441

And see ATTENDANCE. 2; CASE TO ADVISE PROOFS; CASE TO ADVISE TRUSTEES; CONSULTATIONS; ELECTION PETITION; GENERAL COSTS; REVIEWING TAXATION.

COUNTERCLAIM—1. Action and Counterclaim both established—*Form of judgment—Costs—Distinction between set-off and counterclaim—Jud. Act, s. 53, sched. r. 22—O. XXI., r. 10.*] In an action for assault, the defendant set up a counterclaim on foot of promissory notes made by the plaintiff to the defendant. The jury having found for the plaintiff on the assault with £100 damages, and that the plaintiff was indebted to the defendant in £100 on the counterclaim, and the judge at the trial having ordered judgment to be entered for the defendant with costs:—the Court set aside this order, and ordered judgment to be entered for the plaintiff in respect of the action of assault for £100 with costs, and for the defendant in respect of the counterclaim for £100 with costs; that the said sums and costs should be set off against one another; and that the party in whose favour there should be a balance should recover from the other the amount of such balance. Where the defendant establishes a strict set-off equal to or exceeding the plaintiff's demand, this amounts to a defence to the action, and the plaintiff cannot have judgment. But where the defendant establishes a counterclaim merely (as this does not amount to a defence) the plaintiff is entitled to judgment on his cause of action, and the defendant to judgment on his counterclaim;

COUNTERCLAIM—*continued.*

Page

these sums will then be set off against one another, and the party in whose favour the balance shall be will have judgment for the amount of such balance. *Chatfield v. Sedgwick*, 4 C. P. Div., discussed. *Hannan v. Laffan*, 15 Ir. L. T. R. 32 218

2. — **Set-off**—*Cross-liquidated demands*—*Form of judgment*—*Costs, where balance under £20 is recovered.*] In an action brought for a liquidated demand for £25 for work and labour, the defendant pleaded a cross-liquidated demand as a counterclaim, and the jury found for the plaintiff on the statement of claim for £22 8s. 6d., and for the defendant on the counterclaim for £9 13s., and the judge at the trial directed judgment to be entered for the plaintiff for £12 15s. 6d., with his costs. The Taxing Master allowed the plaintiff full costs, and on motion to review his taxation the Exchequer Division declared the plaintiff entitled to his full costs, and directed judgment to be entered that the plaintiff do recover from the defendant £22 8s. 6d. in respect of the cause of action in the statement of claim with costs; that the defendant do recover from the plaintiff £9 13s. in respect of the cause of action in the counterclaim with costs; that the said sums and costs so recovered should be set off, and the party in whose favour there should be a balance should recover from the other such balance :—*Held*, reversing the order of the Exchequer Division, that one judgment should be entered for the plaintiff for £12 15s. 6d., and that the plaintiff, having recovered less than £20, was entitled to no costs, the parties being resident in the same civil bill jurisdiction. In such case a true set-off is not deprived of its real character of a defence by being described and pleaded as a counterclaim. *Ryan v. Fraser*, 16 L. R. Ir. 253 256

3. — **Amount recovered**—*Not more than £20 recovered in original action*—*Rules of April, 1878, Ord. XIII., r. 3.*] In an action for work and labour done, the plaintiff recovered a verdict for £20 and costs on his claim, and also obtained a verdict with costs on a counterclaim for board and lodging :—*Held* (affirming the judgment of the Queen's Bench Division), that he was entitled to the full costs of the counterclaim, and, in addition thereto, the costs of the original action, taxed pursuant to Order VIII., rule 3 of the Rules of April, 1878, in so far as the same were not included in the costs of the counterclaim. *Ruth v. Keeffe*, 20 L. R. Ir. 30, disapproved of. *Griffiths v. Patterson*, 22 L. R. Ir. 656 452

4. — **Taxation**—Principle of taxation explained where plaintiff succeeds on claim, and no rule is made on counterclaim, each party being directed to bear their own costs of the counterclaim. *Belfast Mineral Water Co. v. Dempsey*, 25 Ir. L. T. 587 681

COUNTY COURT—1. **Measuring a sum for Costs**—*Equity Civil Bill.*] When a County Court Judge declares a party to an equity suit entitled to his costs of suit he has no jurisdiction to measure a sum for such costs in the absence of any application by the solicitor of one of the parties that a percentage or a commission should be allowed him in lieu of such costs. The costs must be taxed by the proper officer. *Haig v. Cooke*, 24 Ir. L. T. R. 56 606

2. — **Matter of Account**—*Reference from High Court*—*Costs on High Court Scale.*] Where a case, being a mere matter of account, is referred (under section 6 of the Common Law Procedure Act, 1856) for trial before the County Court Judge, and the order directs that "the costs of this application and of the said inquiry be costs in the cause," the plaintiff's costs of the inquiry in the County Court are to be taxed on the High Court scale. *Wheatcroft v. Foster*, 1 E. B. & E. 737, considered. *Doran v. Clarke*, 24 Ir. L. T. R. 34 600

COUNTY COURT—*continued.*

Page

- Conveyancing on sale in County Court 632
- See SOLICITORS' REMUNERATION ACT.* 42.
- See CIVIL BILL EJECTMENT; CIVIL BILL JURISDICTION; and TENDER.*
- 2 and 3.
- COURT FEES**—Higher and Lower Scale—Withdrawing Certificate—G. O., Nov., 1867 181
- See HIGHER AND LOWER SCALE.*

D

- DEDUCING TITLE**—Scale fee for—No abstract delivered or title deducted.
- See SOLICITORS' REMUNERATION ACT.* 24, 25, 32, and 33.
- DEEDS** 72
- See COPIES OF DEEDS.*
- Perusing deeds mentioned in abstract of title 319
- See SOLICITORS' REMUNERATION ACT.* 50.
- DETINUE**—Is an action of tort 78
- See PAYMENT INTO COURT.*
- Joinder of detinue and money counts 147
- See COMMON LAW PROCEDURE ACT, 1853, s. 243.* 3.

DISCRETION OF TAXING MASTER.

See ADMIRALTY; COUNSEL; ELECTION PETITION; GENERAL COSTS; SOLICITOR AND CLIENT COSTS; DOCUMENTS ENTERED ON DECREE; WITNESSES' EXPENSES.

DISSENTING DEEDS, COSTS OF.

See LANDS CLAUSES CONSOLIDATION ACT, 1845. 1.

- DOCUMENTS ENTERED ON DECREE**—*Discretion of Taxing Master—Measurement and Valuation of Lands—Expenses of Witnesses.*] 1. The entry, upon the decree, of documents as read at the hearing does not, upon taxation of costs between party and party, exclude the Taxing Master's discretion as to disallowing the charges for briefing them to counsel. 2. Upon taxation of costs between party and party, the sums paid to witnesses for inspecting, measuring, and valuing improvements upon lands will not be allowed in addition to the charges for the affidavits made by those witnesses. *Murphy v. Nolan*, I. R. 7 Eq. 498 126

DOCUMENTS—Briefing of.

See COUNSEL. 11. *And see BRIEFING.*

- Consent to admit, tendered and refused—Documents proved by witness—Costs of witness disallowed—Costs of consent disallowed 29
- See ADMIRALTY.* 2.
- "Documents, other."
- See SOLICITORS' REMUNERATION ACT.* 6, 7, 8, 48, 49, 50.

E

- EJECTMENT**—Rent under £100 per annum 231
- See ACTION TO RECOVER POSSESSION OF LAND.* 2.
- County Court jurisdiction—Joinder of Claim for Mesne Rates 227
- See ACTION TO RECOVER POSSESSION OF LAND.* 1.
- ELECTION**—To be remunerated under old system.
- See SOLICITORS' REMUNERATION ACT.* 9, 10, 11, 12, 13, 14, 28, 29, 30, 31, and 43.

	Page
ELECTION PETITION —1. Shorthand writer's notes—Witnesses—Registrar's certificate—Fees to counsel—Special circumstances—Map—Drawing money out of Court— <i>Parliamentary Elections Act, 1863</i> (31 & 22 Vict., c. 125).] The petitioner in an election petition having been awarded the costs of the petition—on a motion that the Master should review his taxation :— <i>Held</i> (1), that the petitioner was entitled to be recouped the sums actually paid by him for copies of the shorthand writer's notes ; (2) that he was entitled to the expenses of witnesses <i>bona fide</i> summoned, though they had not been produced ; (3) that the Registrar's certificate was not necessary to entitle him to the expenses of witnesses ; (4) that he was entitled to the costs of an illustrated map of the county ; (5) that he was entitled to a retainer of ten guineas paid to each of the two senior counsel ; (6) that he was entitled to the fee paid to junior counsel on the hearing of a case reserved ; (7) that he was entitled to the costs of proceedings to draw money out of Court ; (8) that the Master, in exercising his discretion as to the number of counsel, the amount of their fees, the number of consultations, the amount of consultation fees and refreshers, and the expenses of subpoenas to witnesses, telegrams and messages, ought to have regard to the difficulty, magnitude, and importance of the particular case. <i>In re Galway Election Petition—Trench v. Nolan, I. R. 7 C. L. 445</i>	108
2. — Fees to Counsel—Printing analysis of bill of particulars—Expenses of witnesses.] The Master of the Court in taxing the bill of costs of an ordinary parliamentary election petition, reduced—1st, counsel's fees on motion for particulars from five, four, and three guineas to three, three, and two guineas ; 2nd, the fee to senior counsel from two hundred to one hundred guineas, on his brief at the hearing ; 3rd, the fee to junior counsel from sixty to fifty guineas ; 4th, the refreshers of senior counsel from twenty to fifteen guineas ; 5th, the refreshers of junior counsel from twelve to six guineas ; 6th, the fees for eight consultations to four ; 7th, the consultation fees from five, five, and three guineas to three, three, and two guineas ; 8th, he disallowed the expenses of the printing of an analysis of the bill of particulars ; 9th, disallowed £38 17s. 6d. out of £117 12s. incurred in the preliminary examination of witnesses ; 10th, disallowed £214 out of £333 10s., the expenses paid to witnesses, only one shilling viaticum being allowed to witnesses resident in town ; 11th, disallowed various charges and fees on subpoenas ; 12th, disallowed the payments made to assistants for taking evidence. The Court, on appeal, referred the bill of costs back to the Master to reconsider the refresher fees allowed to junior counsel, and to allow the item for printing, and the expenses of summoning any witnesses mentioned in the bill of particulars ; also the necessary expenses of the examination and attendance of such witnesses as had been summoned and attended to such amount as he should see fit ; but refused to interfere with the Master's discretion as to the other items. <i>In re The Armagh Election Petition—Riggs v. Bevesford, 10 Ir. L. T. R. 178</i>	181
EMPLOYMENT —Official liquidator employing solicitor.	507
<i>See SOLICITORS' REMUNERATION ACT. 14.</i>	
— Employment to find mortgagee	618
<i>See SOLICITORS' REMUNERATION ACT. 2.</i>	
EVIDENCE —Which might have been, but was not, brought before Taxing Master will not be acted on by Court on motion to review taxation	23
<i>See REVIEWING TAXATION.</i>	
EXHIBITS —Not taken down on order, costs of	91
<i>See RENEWABLE LEASEHOLD CONVERSION ACT.</i>	

F

	Page
FAMILY ARRANGEMENT —Investigating and deducing title—Sale at valuation—Mortgagor's and mortgagee's costs—Same solicitor for all parties . . .	433
See SOLICITORS' REMUNERATION ACT. 33.	

G

GENERAL COSTS OF ACTION — <i>Plaintiff entitled to—Costs of issues on which plaintiff succeeded in part—Costs of issues on which defendant succeeded in part—Discretion of Taxing Master—Shorthand report of former trial—Fees to counsel—Second case to advise proofs.</i> A plaintiff who is entitled to the general costs of the cause is entitled to all the costs of, and incident to, issues on which he succeeded only in part. Circumstances under which this principle has the effect of limiting the discretion of the taxing officer illustrated. Costs of brief of a shorthand report of a former trial in which the same parties were engaged allowed under special circumstances. Costs of a further case to advise proofs after an amendment in the pleadings allowed. The principle of the case of <i>Morgan v. Gray</i> (10 Ir. Jur. N. S. 335) approved of and followed. <i>Leclerc v. Greene</i> , I. R. 4 C. L. 388	44
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

H

HIGHER AND LOWER SCALE —1. Ejectment on title— <i>Compromise affecting costs—Schedule of fees, Order, December 26, 1877, r. 5—Rules, April, 1878, Order VIII.</i> Circumstances entitling party to have costs taxed under higher scale. <i>Dennis v. Best</i> , 12 Is. L. T. R. 152	194
2. — Practice — <i>Taxation—Court fees—Withdrawing certificate after appeal—General Order, Nov., 1867.</i> In a suit to raise a charge of £500, for which purpose it was sought to set aside a deed of assignment on allegations of circumstances amounting to equitable fraud, the Master of the Rolls, holding that the transaction was <i>bona fide</i> , dismissed the plaintiff's bill, but this decree was reversed by the Court of Chancery Appeal. The plaintiff's solicitor, not considering at the commencement of the suit that there was any question to be taken into account which affected the scale of fees and charges except that of the amount in dispute, had lodged with the Clerk of Records and Writs a certificate that the lower scale of fees of Court was applicable, under the General Order, Nov., 1867; but after the reversal of the decree of the Court below, finding that he had been mistaken he withdrew the certificate and lodged his bill of costs on the higher scale, and paid the difference between the higher and lower scale of Court fees payable on behalf of the plaintiff:— <i>Held</i> , that as the deed was sought to be set aside on allegations of fraud the higher scale of Court fees was that applicable; and that the plaintiff's costs should be taxed on such higher scale accordingly, his solicitor undertaking that all additional fees properly payable thereunder and in the proceedings already had should be made good. <i>Bolingbroke v. O'Rorke</i> , 11 Ir. L. T. R. 101	185
HOTEL EXPENSES	16
See ADMIRALTY. 1.	

I

INCUMBRANCES —Sale subject to—Scale fee for deducing title	377
See SOLICITORS' REMUNERATION ACT. 38.	

	Page
INSTRUCTIONS —Prescribed fee in County Court	226
<i>See</i> TENDER OF DEBT. 2.	
— Principles on which costs of instructions for bill, amended bill, and affidavit in aid of plaintiff's case are to be taxed. <i>Smart v. Verdon</i> , 9 Ir. L. T. 598	151
INTEREST —Delivery of bill without claiming interest—Taxation	409
<i>See</i> SOLICITORS' REMUNERATION ACT. 15.	
— Administration action—Costs payable out of fund	522
<i>See</i> SOLICITORS' REMUNERATION ACT. 16.	
INTERROGATORIES —Fee to senior counsel for settling	634
<i>See</i> COUNSEL. 8.	
INVESTIGATING TITLE.	
<i>See</i> SOLICITORS' REMUNERATION ACT. 26, 33, 34, 40, 43.	
ISSUE, COSTS OF —On which party partly successful	44
<i>See</i> GENERAL COSTS.	

J

JOINDER OF COUNTS —Tort and contract.	
<i>See</i> PAYMENT INTO COURT. 6, 7, 8, 9.	
— Money counts and detinue	147
<i>See</i> COMMON LAW PROCEDURE ACT, 1853, s. 243. 3.	
JOINDER OF ISSUE	395
<i>See</i> COUNSEL. 4.	
JUDGMENT BY DEFAULT.	
<i>See</i> COMMON LAW PROCEDURE ACT, 1856, s. 97. 3. SUBSTITUTION OF SERVICE. 3.	
JUDICATURE ACT, 1873, s. 53 —Costs in discretion of Court	200, 214
<i>See</i> COMMON LAW PROCEDURE ACT, 1856, s. 97. 3.	
<i>See</i> NOTICE PARTY.	
— S. 53, Schedule Rule 22,	218
<i>See</i> COUNTERCLAIM. 1.	
<i>See</i> ORDERS, GENERAL.	

L

LANDS CLAUSES CONSOLIDATION ACT, 1845—1. Disentailing deed — <i>Payment out of Court—Compulsory purchase—Entailed lands compulsorily taken—Purchase-money lodged in Court and invested—Petition for transfer out of funds—Costs—Taxing Master.</i>] Upon a petition for the transfer to the petitioner of funds lodged in Court as the purchase-money of lands taken by Commissioners under their compulsory powers, of which lands the petitioner was tenant in tail in possession, the Court refused to direct that the costs of a deed disentailing the funds in Court were payable by the Commissioners :— <i>Seemle</i> , the Court will not specify what costs are properly payable within the 80th section of the Lands Clauses Consolidation Act, 1845, but will leave all questions on that point to the decision of the Taxing Master in the first instance. <i>In re Merchant Shipping Act, 1854 : Ex parte Allen</i> , 7 L. R. Ir. 124	223
2. — Conveyance to promoters of undertaking— <i>Costs—One solicitor acting for several clients—Bill of costs—Taxation items.</i>] The practice on the taxation of the costs of, and incidental to, the conveyance of lands to	

LANDS CLAUSES CONSOLIDATION ACT, 1845—continued.

Page

the promoters of an undertaking under the Lands Clauses Act, 1845, and Railways (Ireland) Acts, is now regulated by section 12 of the Railways (Ireland) Act, 1854, and not by section 83 of the Lands Clauses Act, 1845. Where one solicitor is employed by several clients for the purposes of such conveyances, he is not entitled to furnish separate bills of costs, charging taxation items in respect of each bill. *In the matter of the Belfast Water Commissioners: ex parte Orr: ex parte Usher: ex parte Connor*, 21 L. R. Ir. 342 463

3. — Costs of conveyance of outstanding interest.] A. had for more than twelve years been in possession of premises held under a lease for a life and term of years. The premises were taken by a company, under the powers conferred by an Act with which the Lands Clauses Consolidation Act was incorporated. The company required that administration should be taken out to B., the assignee of the lease, through whom A. claimed. C. accordingly took out administration to B., and conveyed her interest as administratrix in the premises to A.:—*Held*, that, under section 82 of the Lands Clauses Consolidation Act, the costs of this conveyance should be borne by the Company. *In re Liverpool Improvement Act* (L. R. 5 Eq. 282) followed. *In the matter of the Dublin (South) City Market Co.: ex parte Keatley*, 25 L. R. Ir. 265 641

— Sale under—Reinvestment of proceeds—Costs 287, 294
See SOLICITORS' REMUNERATION ACT. 18.

— Purchaser's costs under—Conveyance—Grant of easement over land 533
See SOLICITORS' REMUNERATION ACT. 30.

— Repurchase of superfluous land—No investigation of title 290
See SOLICITORS' REMUNERATION ACT. 43.

— Perusing deeds mentioned in abstract 319
See SOLICITORS' REMUNERATION ACT. 50.

LEASE—Scale fee for preparing—Agreement for lease.

See SOLICITORS' REMUNERATION ACT. 19, 21.

— Made in consideration of rent and premium.
See SOLICITORS' REMUNERATION ACT. 23, 24.

— Made in consideration of shares in company 437
See SOLICITORS' REMUNERATION ACT. 22.

— Abortive negotiations for 546
See SOLICITORS' REMUNERATION ACT. 20.

— Costs to be paid by lessee.
See SOLICITORS' REMUNERATION ACT. 9.

LETTER—*Seble*, that an attorney of a creditor retained to demand a debt has no right to insist on payment of any costs of his letter demanding the debt previously to issuing a writ of summons and plaint. *Allen v. O'Callaghan*, 10 Ir. L. T. R. 131 172

M

MAP—Costs of 108
See ELECTION PETITION. 1.

MARSHAL—Travelling and hotel expenses 16
See ADMIRALTY. 1.

MEASURED SUM—Costs of motion—Taxing Master not restricted by, when taxing as between solicitor and client. *Talbot v. Talbot*, 11 L. T. 44 3

MEASURED SUM—*continued.*

	Page
— County Court—Equity civil bill—Judge has no power to measure a sum for costs	606
See COUNTY COURT. 1.	

MODELS—Thought by the judge who tried the case to be material and necessary allowed for on taxation between party and party. *Jameson v. Royal Ins. Co.*, 8 Ir. L. T. 375 131

MORTGAGE—Of estate in suit to pay costs as between solicitor and client 3
See SOLICITOR AND CLIENT COSTS. 5.

— To secure purchase money—Investigation of mortgagor's title—Scale fee 433
See SOLICITORS' REMUNERATION ACT. 33.

— To secure balance of purchase money.
See SOLICITORS' REMUNERATION ACT. 40.

— Solicitor acting for both mortgagor and mortgagee 433
See SOLICITORS' REMUNERATION ACT. 33.

— Further charge 657
See SOLICITORS' REMUNERATION ACT. 26.

— Release of outstanding mortgage 689
See SOLICITORS' REMUNERATION ACT. 36.

MORTGAGEE'S COSTS—Concurring in sale by tenant for life—Settled Land Act 235
See SOLICITORS' REMUNERATION ACT. 35.

— Concurring in lease made by mortgagor 270
See SOLICITORS' REMUNERATION ACT. 21.

— Requested to sell under power of sale—Solicitor acting for—Notice to elect 360
See SOLICITORS' REMUNERATION ACT. 10.

— Sale of leaseholds—Administration action 417
See SOLICITORS' REMUNERATION ACT. 49.

N

NEGOTIATIONS—For a lease—Carried on through lessor's solicitor 278
See SOLICITORS' REMUNERATION ACT. 28.

— Abortive negotiations 546
See SOLICITORS' REMUNERATION ACT. 20.

— For sale—what amounts to 528
See SOLICITORS' REMUNERATION ACT. 47.

NEW TRIAL MOTION—Briefs of a new trial motion prepared during the long vacation before the conditional order was obtained allowed on taxation between party and party where the action was settled four days after the conditional order was obtained. *Jameson & Co. v. Royal Ins. Co.*, 8 Ir. L. T. 375 131

NOMINAL DAMAGES—Brought into Court and accepted—Gen. Ord. XXX., r. 4—Slander action 397
See PAYMENT INTO COURT. 1.

NON-PROFESSIONAL WORK—Special agreement 618
See SOLICITORS' REMUNERATION ACT. 2.

NOTICE PARTY—*Order XV., rr. 18, 21—Judicature Act, s. 53.* A person on whom the defendant had served notice under Order XV., rule 8, obtained liberty to defend the action as to certain causes of action in tort, and the question of his costs was reserved. The jury having found for the defendant in all these causes of action, and the judge who tried the case being of opinion

NOTICE PARTY—*continued.*

Page

that no witnesses were called for the defence unnecessarily :—*Held*, that the defendant should pay all costs necessarily incurred by the notice party ; and that in ascertaining the defendant's costs of the same causes of action to be paid by the plaintiff, the witnesses called by the plaintiff should be taken to be witnesses for the defendant. *Brunker v. North*, 15 Ir. L. T. R. 10 . 214

O

OFFICIAL LIQUIDATOR —Winding up—Employment of solicitor—Notice to elect	507
<i>See SOLICITORS' REMUNERATION ACT.</i> 14.	
— Property of Company sold by—scale fee payable on what amount	377
<i>See SOLICITORS' REMUNERATION ACT.</i> 38.	
ONE SET OF COSTS	60
<i>See SEPARATE DEFENCES.</i>	
ORDERS AND RULES —1843, CLXII.	60
<i>See SEPARATE DEFENCES.</i>	
— 1854 (11th Jan.), Sched. I., items 100, 101	343
<i>See ATTENDANCE.</i> 2.	
— 1854 (11th Jan.), XLIX.	212
<i>See PAYMENT INTO COURT.</i> 3.	
— 1856 (22nd Jan.), I.	41
<i>See SUBSTITUTION OF SERVICE.</i> 2.	
— 1867 (Nov.)	185
<i>See HIGHER AND LOWER SCALE.</i> 2.	
— 1868 (May), XII.	157
<i>See COUNSEL.</i> 3.	
— 1868 (12th Dec.), VIII.	415
<i>See ADDITION TO BILL OF COSTS.</i>	
— 1872, Schedule to Gen. Orders	324
<i>See ARRANGING DEBTOR.</i>	
— 1877 (18th Dec.), VIII., r. 3	382
<i>See COMMON LAW PROCEDURE ACT, 1853.</i> 243, 4.	
— 1877 (18th Dec.), XII., r. 3	200
<i>See COMMON LAW PROCEDURE ACT, 1856, s. 96.</i> 3.	
— 1877 (18th Dec.), XV., rr. 18, 21	214
<i>See NOTICE PARTY.</i>	
— 1877 (18th Dec.), XXI., r. 10	218
<i>See COUNTERCLAIM.</i> 1.	
— 1877 (18th Dec.), XXX., r. 4.	
<i>See PAYMENT INTO COURT.</i> 1, 2, 3.	
— 1878 (8th April), VIII., r. 2	200, 225
<i>See COMMON LAW PROCEDURE ACT, 1856, s. 96.</i> 3.	
And <i>SUBSTITUTION OF SERVICE.</i> 3.	
— 1878 (8th April), VIII., r. 3	332, 452
<i>See COMMON LAW PROCEDURE ACT, 1853, s. 243.</i> 4.	
And <i>COUNTERCLAIM.</i> 3.	
— 1878 (8th April), X., r. 12	645
<i>See COUNSEL.</i> 10.	

ORDER AND RULES—*continued.*

— 1878 (8th April), XIII., r. 3	Page 452
<i>See</i> COUNTERCLAIM. 3.	
— 1882 (1st June), Schedule item 17	598
<i>See</i> RECEIVER'S ACCOUNT.	
— 1882 (1st June), Schedule item 29	343, 423
<i>See</i> ATTENDANCE. 1 and 2.	
— 1882 (August) [English].	
<i>See</i> SOLICITORS' REMUNERATION ACT.	
— 1883, XLI., r. 3, XLII., r. 16 [English]	522
<i>See</i> SOLICITORS' REMUNERATION ACT. 16.	
— 1884 (16th April).	
<i>See</i> SOLICITORS' REMUNERATION ACT.	
"OTHER DOCUMENTS."	
<i>See</i> SOLICITORS' REMUNERATION ACT. 6, 7, 8, 48, 49, 50.	

P

PARTICULARS, MOTION FOR —Counsel's fees	181
<i>See</i> ELECTION PETITION. 2.	
PARTIES IN SAME INTEREST	60
<i>See</i> SEPARATE DEFENCES.	
PARTITION ACTION —Costs of defendant's solicitors—Conveyancing	316
<i>See</i> SOLICITORS' REMUNERATION ACT. 44.	
PARTY AND PARTY COSTS —How far distinguishable from costs between solicitor and client. <i>Smart v. Verdon</i> , 9 Ir. L. T. 598	153
PAYMENT INTO COURT —1. Acceptance — <i>Slander</i> — <i>Gen. Ord. XXX., r. 4—Judicature Act, Sec. 53.</i>] The defendant, in an action of slander, paid sixpence into Court, and the plaintiff accepted it in full satisfaction of his claim. The Taxing Master refused to tax the plaintiff's costs, upon the ground that the plaintiff was only entitled to sixpence costs, and the Queen's Bench Division affirmed his ruling:— <i>Held</i> , by the Court of Appeal (Lord ASHBOURNE, C., and FITZGIBBON and BARRY, L.J.J.), that the plaintiff was entitled to tax his costs necessarily and properly incurred in the action. <i>Query</i> , however, whether the Court had not jurisdiction under Sec. 53 of the Judicature Act in such case to deprive the plaintiff of the costs on a proper case being made for such exercise of discretion. <i>M'Sheffrey v. Lanagan</i> , 20 L. R. Ir. 528	397
2. — Acceptance — <i>For Debt and Costs</i> — <i>Costs—G. O. XXX., r. 4—Appendix B., Form 6.</i>] In an action for a money demand the defendant pleaded an agreement, after action brought, by the plaintiffs to take a certain sum for debt and costs, and brought that amount into Court on foot of debt and costs. The plaintiffs' solicitor served notice on the defendant accepting the sum so paid into Court "in satisfaction of the plaintiffs' claim in respect of which it was paid in":— <i>Held</i> , that the plaintiffs were not entitled to any costs beyond the sum lodged in Court. <i>Goodbody v. Gullaher</i> , 16 L. R. Ir. 336	311
3. — Acceptance — <i>Money lodged under order for security for costs upon terms—Tender before action without plea—Costs of action—O. XXX., r. 4—49 G. O., 1854.</i>] A defendant had applied for an order for security for costs, and an order was made on the terms that he should pay into Court a sum he admitted to be due and stated he had tendered before action as being	

PAYMENT INTO COURT—*continued.*

Page

the entire amount due. He accordingly lodged this sum in Court, and the plaintiff drew out same "in full satisfaction":—*Held*, the defendant was entitled to the costs of the action. *Wolf v. Walker*, 14 Ir. L. T. R. 111 . 212

4. — **Subsequent Costs.**] The defendant in an action lodged money in Court in satisfaction of the plaintiff's demand; and on the same day on which he served notice of the lodgment of money, served notice of motion to change the venue. The plaintiff took out the money on account, and subsequently elected to take the money so lodged in Court in satisfaction of his demand:—*Held*, that the plaintiff must pay to the defendant his costs, necessarily and properly incurred subsequent to the lodgment of the money, including the costs of the motion to change the venue. *Lindsay v. Crotty*, I. R. 1 C. L. 731 . 5
5. — **Subsequent Costs.**] B. being sued by A. for the sum of £32 for goods delivered, on the 18th December filed his defence paying £29 into Court, and alleging that the goods were worth no more. On the 21st December B. served notice of motion to change the venue, which motion was moveable before a Judge in Consolidated Chamber on the 4th January. On the 3rd January the plaintiff's attorney wrote to the defendant's attorney that the plaintiff would take the money out of Court in satisfaction of his demand. This letter was received on the 4th, and a telegram sent to Dublin to stop the motion, which, however, arrived after the motion had been made. The defendant was held entitled to the costs of the motion, but not to the costs of the affidavits on which it was grounded. *Quin v. Gray*, I. R. 1 C. L. 223 . 8
6. — **Joinder of Counts in Tort**—*Amount recovered.*] In an action in which there were three counts, each in tort, and the parties resided within the jurisdiction of the Civil Bill Court of the County in which the causes of action had arisen, the jury found a verdict for the plaintiff for £2 damages on two counts, and that £5, which had been lodged in Court by the defendant on foot of the third count, was sufficient:—*Held*, by the Court of Appeal (Lord ASHBORNE, C., O'BRIEN, C.J., and FITZGIBBON, L.J.; *diss.* PORTER, M.R., and BARRY, L.J.), reversing the decision of the Exchequer Division, who felt themselves bound to follow *Arkins v. Armstrong*, Ir. R. 3 C. L. 373, that the plaintiff was not entitled to any costs of the action. *Arkins v. Armstrong* (Ir. R. 3 C. L. 373) overruled. *Myers v. Phelan*, 26 L. R. I. 218 . 558
7. — **Joinder of Counts in Contract**—*Amount recovered.*] If in an action of contract, the plaintiff obtain, partly by money paid into Court (which he accepts) and partly by verdict, a sum amounting to £20, he is entitled to full costs under Sec. 243 of the Common Law Procedure Act, 1854: although the contract upon foot of which the money was paid into Court was distinct from that for breach of which the damages were awarded by the verdict. *Palmer v. Garrett*, I. R. 5 C. L. 412 . 74
8. — **Joinder of Counts in Contract and in Tort**—*Detinue*—*Common Law Procedure Act, 1853, s. 243*—*Amount recovered.*] Where the plaint contains counts in contract and also in tort, the plaintiff cannot for the purpose of entitling himself to full costs, add a sum paid into Court on foot of the counts in contract (which, upon issue joined, the jury have found to be sufficient), to the damages awarded by the verdict on the counts in tort. Detinue is an action of tort. *Byrne v. McEvoy*, I. R. 5 C. L. 568 . 78
9. — **Joinder of Counts in Contract and in Tort**—*Common Law Procedure Act, 1853, s. 243.*] Where the plaint contains a count in contract and also a count in tort, the plaintiff cannot, for the purpose of entitling himself to full costs, add a sum paid into Court on foot of the count in contract (which, upon issue joined, the jury have found to be sufficient), to the damages awarded by the verdict on the count in tort. *Leonard v. Brownrigg*, I. R. 6 C. L. 161 . 82

PENDING BUSINESS.

Page

See SOLICITORS' REMUNERATION ACT.	28, 29, 30, 31, 43.	
PERUSAL —Lands compulsorily taken—Deeds referred to in abstract		319
See SOLICITORS' REMUNERATION ACT.	50.	
— Abstract of title		273
See SOLICITORS' REMUNERATION ACT.	48.	
— Receiver's account		593
See RECEIVER'S ACCOUNT.		
— Conditions of sale		417
See SOLICITORS' REMUNERATION ACT.	49.	
— Conveyance in partition action		316
See SOLICITORS' REMUNERATION ACT.	44.	
POSTING —Service by		411
See CIVIL BILL EJECTMENT.		

PREPARATION OF CONTRACT.

See SOLICITORS' REMUNERATION ACT. 32, 34, 35, 39, 41, 43, 45.

PRESSURE, CHARGES FOR —Conveyancing—Percentage		238
See SOLICITORS' REMUNERATION ACT.	32.	

PROOFS.

See CASE TO ADVISE PROOFS. 1, 2, 3.

R

RECEIVER'S ACCOUNT — <i>Perusal of Receiver's "Account" by Solicitor attending afterwards, on its passing, for party interested—Allowance of fee for—General Order of 1st June, 1882, Schedule item 17.</i> Receiver's accounts are "accounts" within item 17 of the Schedule of Costs appended to the General Order of 1st June, 1882, and, accordingly, the solicitor for a party interested— <i>e.g.</i> , the guardian of the fortune in a minor matter—who attends on the passing of a receiver's account is entitled to the fees therein provided for its previous perusal. Decision of the Taxing Master reversed. <i>In re Higgins, minors</i> , 23 L. R. I. 596		598
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--	-----

REFRESHER FEES —None allowed on motion unless certified		23
----------------------------------------------------------------	--	----

See REVIEWING TAXATION.

— Amount of

See COUNSEL. 3, 6, 7.

See ELECTION PETITION. 1 and 2.

RENEWABLE LEASEHOLD CONVERSION ACT — <i>Correspondence prior to filing petition—Exhibits not referred to in order.</i> Where a petitioner under the Renewable Leasehold Conversion Act established his right to a fee-farm grant, but was ordered to pay the respondent's costs of the matter:— <i>Held</i> —1. That the Court had no discretion, under Section 33 of the Act, to include in such costs those of proceedings that had taken place out of Court before the presenting of the petition, and were not connected with its preparation. 2. That the respondent was entitled to the costs of the briefs of such documents as, though not taken down on the order as read, the Taxing Master in his discretion should consider to have been necessary to support the application. In the case of motions and summary petitions, the affidavits on which the proceeding is grounded are alone taken down on the order, leaving it to the discretion of the Taxing Master to determine what other documents (if any) connected with the case should be allowed for in the costs. It is his business, solely to adjudicate upon such questions, and exercise his discretion in respect of them. <i>Ex parte Hutchinson</i> , I. R. 7 Eq. 56		91
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--	----

	Page
REPLICATION, UNNECESSARY	1
<i>See</i> UNNECESSARY MOTION FOR LEAVE TO REPLY.	
REPLY —Fee to counsel for settling	395
<i>See</i> COUNSEL, 4.	
RETAINER	108, 153
<i>See</i> COUNSEL, 5.	
<i>See</i> ELECTION PETITION, 1.	
RESIDENCE —Parties within same civil bill jurisdiction.	
<i>See</i> COMMON LAW PROCEDURE ACT, 1856, s. 97.	

REVIEWING TAXATION—*New Evidence—Refresher Fees on Motion—Attendance of country Solicitor—Fee on draft Deed—Costs of Taxation.*] An appeal from the decision of the Taxing Master will not be allowed except on a question of principle. The Taxing Master's decision will not be reversed on new evidence which might have been produced before him. A refresher fee to counsel on a motion is never allowed in taxation unless it be certified by the Court. A fee of £3 3s. per diem to a solicitor for attendance in the country is not allowed on taxation without the special authority of the client. A general authority is not sufficient. A solicitor is not entitled to a fee of £2 2s. for approval of a deed where he has been investigating the title, and he gets the general costs relating to the matter which is the subject of the deed. The rule disallowing the costs of taxation, where more than one-sixth is struck off, applies to all taxations, whether under the Solicitors' Act or otherwise. *In re Mortimer*, I. R. 4 Eq. 96 23

S

SALE BY MORTGAGEES UNDER POWER OF SALE—*Advertisements—Attendance of Solicitor.*] A proper sum will be allowed for costs of advertising when a mortgagee is selling under a power of sale in his mortgage. In such case the solicitor for the mortgagee is entitled to his travelling expenses for attending the sale. *Brady v. Tucky*, 12 Ir. L. T. 309 193

— Attempted ineffectual sale.

See SOLICITORS' REMUNERATION ACT, 3, 4, 5, and 35.

— Conveyancing on Sale.

See SOLICITORS' REMUNERATION ACT, 32-52.

— Subject to incumbrances—Scale fee for deducing title 377

See SOLICITORS' REMUNERATION ACT, 38.

SANITARY REGULATIONS—Prepared for Town Commissioners.

See SOLICITORS' REMUNERATION ACT, 6 and 7.

SEPARATE DEFENCES—*Parties in the same interest—Tenant for life and remainderman—Minor defendant—162nd G. O. 1843.*] Where the interests of a tenant for life and remainderman in a suit affecting the estate are identical, and they appear by the same solicitor, they should join in their answer, and appear by the same counsel at the hearing. They will be allowed, but one set of costs on taxation, under the 162nd General Order of 1843, though the remainderman be a minor and defends by guardian. *De Burgh v. Chichester*, I. R. 4 Eq. 623 60

And *see* SEVERAL DEFENDANTS.

SERVICE ON CORPORATION AGGREGATE 14

See ADVERTISEMENTS, 1.

SET-OFF—Distinguished from counterclaim 256

See COUNTERCLAIM, 2.

SETTLED LAND ACT —Sale by tenant for life	235
<i>See SOLICITORS' REMUNERATION ACT.</i> 35.	
SEVERAL DEFENDANTS — <i>Use of the word "respectively" in decree awarding costs.</i>] It is not the practice, except under special circumstances, to insert the word respectively in decrees giving costs to several defendants; and, as an ordinary rule, the propriety of several defendants appearing separately should be left open for inquiry upon taxation:— <i>Semble</i> , the insertion of "respectively" in a decree, after the names of several defendants to whom costs are awarded, renders it obligatory on the taxing officer to tax their costs separately. <i>Sealy v. Stawell</i> , 1 R. 10 Eq. 206	179
<i>See SEPARATE DEFENCES</i>	60
SHERIFF'S FEE —Jury panel—Taxation between party and party. <i>Jameson & Co. v. Royal Insurance Co.</i> , 8 Ir. L. T. 375	131
SHORTHAND REPORT —Of former trial allowed under special circumstances. <i>Leclerc v. Greene</i> , 1 R. 4 C. L. 388	44
— Of judgment for use of Court of Appeal. <i>Jessop v. Ousack</i> , 25 L. R. Ir. 244	634
SHORTHAND WRITERS' NOTES — <i>Evidence at trial.</i>] Not allowed on taxation between party and party. <i>Jameson & Co. v. Royal Insurance Co.</i> , 8 Ir. L. T. 375	131
— Included in costs of trial in Probate action. <i>In the Goods of Hayden</i> , 23 I. L. T. 566	557
<i>See ELECTION PETITION.</i> 1, 108.	
SLANDER —Action for—Nominal damages brought into Court and accepted—Gen. Ord. XXX., r. 4—Judicature Act, s. 53	397
<i>See PAYMENT INTO COURT.</i> 1.	
SOLICITOR AND CLIENT COSTS —1. How far distinguishable from costs between party and party. <i>Smart v. Verdon</i> , 9 Ir. L. T. 598	153
2. — Principles of taxation — <i>Probate suit</i> — <i>Discretion of Taxing Master</i> — <i>Schedule of fees</i> — <i>Medical Witnesses.</i>] (1) On taxation of costs, as between solicitor and client, the schedule of fees, though a guide to the Taxing Officer, does not bind him in the exercise of his discretion, which ought to be exercised upon the principle of liberality to the solicitor and justice to the opposite party. (2) The remuneration for loss of time which medical witnesses attending during the examination of the other witnesses fairly claim may be paid to them, and charged to the opposite party. <i>Ryan v. Dolan</i> , 1 R. 7 Eq. 92	104
3. — Principle of taxation.] Where defendant in an action consenting to a verdict and undertaking to pay plaintiff's costs as between solicitor and client. <i>Maguire v. O'Connor</i> , 1 Ir. L. T. 702	13
4. — Measured sum — <i>For costs of motion in suit.</i>] Where a party upon the hearing of a motion is declared entitled to a fixed sum for costs of the motion to be paid by the receiver in the cause, and subsequently is declared entitled to costs of suit to be taxed between solicitor and client, the amount to which the costs of the motion may be taxed is not restricted by the sum fixed to be paid by the order. <i>Talbot v. Talbot</i> , 1 Ir. L. T. 44	3
5. — Payment out of fund — <i>To be paid out of a fund to be raised by mortgage of estate</i> — <i>Mode of taxation.</i>] Where a party in a suit was declared entitled to costs to be taxed between solicitor and client, and the decree provided that these costs should be paid from a fund to be raised by a mortgage of an estate belonging to another party, the Taxing Master should tax these costs as costs between solicitor and client against a fund belonging to an adverse party, and not as full costs between solicitor and client, as they would be taxed when payable by the client. <i>Talbot v. Talbot</i> , 1 Ir. L. T. 44	3

(a) AGREEMENT WITH CLIENT.

Page

SOLICITORS' REMUNERATION ACT, 1881.

1. — **Agreement with client as to remuneration**—*Section 8.*] The Act contemplates an agreement for the payment of a lump sum or a commission in lieu of the solicitor's remuneration. An agreement for a payment in addition to his remuneration is not within the Act. *In re Montague, Scott and Baker*, W. N. 1889, 40 530
2. — **Agreement with client as to remuneration**—*Client—Employment of Solicitor—Mortgage.*] S., being desirous of borrowing money on mortgage, wrote to P., a solicitor, a letter instructing him to raise £300 upon a specified security, and undertaking "to pay your costs (which I agree at £20, exclusive of money out of pocket) to be incurred in and about doing what is necessary for the purpose of these instructions." P. found a mortgagee and carried out the mortgage, acting on behalf of both the mortgagor and the mortgagee, and retained out of the £300 £20 for costs of both parties, other than out of pocket costs. S. then applied for an order directing P. to deliver a bill of all such fees, charges, and disbursements as he claimed or had deducted, and referring such bill when delivered to taxation:—*Held*, first, that S., the mortgagor, was a "client," and had employed P. as his solicitor, within the meaning of Sect. 1 of the Solicitors' Remuneration Act, 1881; secondly, that although the £20 was partly in respect of business in which the solicitor was acting on behalf of the mortgagee, the letter was an agreement for remuneration between client and solicitor within the 8th Section of the Act; and, thirdly, that in the absence of evidence that the charge of £20 was either unfair or unreasonable it ought not to be referred for taxation. *In re Palmer*, 45 Ch. D. 291 . 618

(b) ATTEMPTED INEFFECTUAL SALE.

3. — **Attempted ineffectual sale**—*No probability of sale being effected soon.*] The costs of an attempted ineffectual sale of property when there is no probability of the sale being effected for some years to come, should be taxed under Rule 2(c) of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881. *In re Smith, Pinsent & Co.* 44 Ch. D. 303 . 613
4. — **Attempted ineffectual sale**—*Trustees—Change of Trustees and of Solicitors—Taxation of costs of old Trustees—General Order, r. 2(c), schedule I., part 1, r. 2.*] Schedule I., part 1, rule 2 of the General Order to the Solicitors' Remuneration Act, 1881, applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors. If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under General Order, r. 2(c). *In re Dean: Ward v. Holmes*, 32 Ch. D. 209 329
5. — **Attempted ineffectual sale**—*Special condition as to unsold lot.*] Where a lot is set up for sale among others, but not sold, the solicitor is entitled to remuneration under the old system for a special condition relating to that lot. *In re Reade's Trusts, Salthouse and Reade*, 33 S. J. 219 528
Compare below SOLICITORS' REMUNERATION ACT. 35.

(c) CONVEYANCING BUSINESS WITHIN THE ACT.

6. — **Conveyancing business**—*Documents—Agreement for execution of sewage works.*] The words "other documents" in the heading to Schedule II. to the General Order, made under the Solicitors' Remuneration Act, 1881, mean other documents *ejusdem generis* with deeds and wills. An agreement for the execution of sewage works, made between a contractor and a board of town commissioners, though not a deed, is "conveyancing business" within the meaning of Sect. 2 of the Solicitors' Remuneration Act,

SOLICITORS' REMUNERATION ACT, 1881—continued.

Page

- 1881, and is taxable under the scale settled by Schedule II. of the above-mentioned General Order. *Ex parte O'Hagan* (19 L. R. Ir. 99) followed. *In re Atkinson and Lurgan Commissioners* (24 L. R. Ir. 182) considered. *Ex parte Caruth*, 25 L. R. Ir. 478 653
7. — **Conveyancing business—Documents—Sanitary regulations—Collectors' and contractors' bonds—Warrants of attorney.**] Solicitors to Town Commissioners prepared sanitary regulations, collectors' and contractors' bonds, and warrants of attorney for their clients :—*Held*, by O'BRIEN, J. (affirming the Taxing Officer); *diss.*, JOHNSON, J.), that such items were not within Schedule II., rule 2, General Order, 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, sect. 2, but should be taxed under the scale of fees prior to that Act. *Held*, by JOHNSON, J., that such items were properly taxable under the scale settled by Schedule II., above referred to. *In re Atkinson & Sons and the Lurgan Town Commissioners*, 24 L. R. Ir. 182 . 498
8. — **Conveyancing business—Case for Counsel to advise Trustees—Statements and Directions as to investments.**] In taxation between solicitor and client, cases for counsel to advise trustees whether they should require a release from their *cestui que trusts* on their discharge, statements for the information of the client as to the investment of the trust funds and the prudence of changing it, or directions to the trustees signed by the client, consenting to the change of investment, and directing a new investment, are not included in Schedule II. of the General Order to the Solicitors' Remuneration Act, 1881, but are taxable under the scale of fees prior to that Act. *Ex parte O'Hagan*, 19 L. R. Ir. 99 386
- Compare below SOLICITORS' REMUNERATION ACT. 17 and 30.

(d) ELECTION AS TO REMUNERATION.

9. — **Election—Undertaking any business—Client—Lease.**] The solicitors of the assigns of a lease of copyhold land wrote to P., the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On the 25th July P.'s solicitors wrote to the solicitors of the applicants stating that P. had called on them with the letter, and that the matter therein referred to should have their attention, and asking for evidence of the title of the applicants. The evidence required was furnished. Some delay took place in consequence of the necessity of P. being admitted and obtaining a license to demise. On the 16th of October P.'s solicitors were informed by the steward of the manor that P. could be admitted, and that license to demise would be given. On the 19th of October P.'s solicitors gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under the Solicitors' Remuneration Act. In the books of the solicitors was an entry under the date "instructions for drawing new leases," but there was no evidence as to the circumstances under which it was made. On the 21st of October P.'s solicitors sent to the applicant draft leases. The leases were granted, and the lessees, who were bound to pay the costs of the lessor's solicitors, insisted that the remuneration must be according to the scale in Schedule I. :—*Held* by the Court of Appeal (affirming the decision of KAY, J.) that the election on the 19th of October was too late, but that the business had been undertaken on the 25th of July, and that the taxation must be according to the scale. *Held*, by KAY, J., that where under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under Rule 6 need be given by the lessor's solicitor is the lessor himself, the assigns not being "clients" of

SOLICITORS' REMUNERATION ACT. 1881—*continued*.

Page

the solicitor within Sec. 1, Sub-sec. 3, of the Solicitors' Remuneration Act, 1881, so as to make any notice to them necessary. *In re Allen*, 34 Ch. D. 433 348

10. — **Election**—*Notice*—"Undertaking any business"—"*Client*"—"*Mortgagee*"—"*Subsequent Incumbrancer*"—"*Mortgagor*."] The notice of election under Rule 6 of the General Order to the Solicitors' Remuneration Act, 1881, must be given by the solicitor before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the order did not apply, it is too late for him to elect. *In re Allen* followed. Per KAY, J.:—"Where notice of election under the rule has been properly given by a solicitor to his client, a first mortgagee, it is binding on a subsequent incumbrancer and also on the mortgagor." A solicitor who acted for a mortgagee in relation to the mortgaged property received from the solicitors of the persons entitled to the equity of redemption a request that the mortgagee would sell under his power of sale, and in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorised he would, apart from the rules under the Solicitors' Remuneration Act, have been entitled to be paid, and which would be covered by the scale fee. The sale was completed:—*Held* (affirming the decision of KAY, J.), that a notice of election to be remunerated according to the old system, which was given by the solicitor after work of the above description had been done, was too late, although given before the contract was signed, for that as the client had ratified his proceedings he stood in the same position as if he had received previous authority, and must be treated as having undertaken the business as soon as he did any work of the above description. The Taxing Master having taxed according to the scale, an objection was taken, solely grounded on the notice to elect:—*Held*, that the Court could not enter upon the question whether there had been an agreement between the mortgagee and his solicitor that the latter should be remunerated according to the old system. Whether, if the right to elect was gone, any such agreement would bind the parties entitled to the equity of redemption, *quære*. *Hester v. Hester*, 34 Ch. D. 607 360
11. — **Election**—*Notice*—"Undertaking any business"—"*Client*"—"*Several trustees*."] The notice of election under Rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, as to remuneration for conveyancing business arising in an action must be given by the solicitor before he undertakes such conveyancing business. After having done any work in the matter which would properly be covered by the scale charge—*e. g.*, discussed with the client the mode of sale and questions relating to the title—it is too late for him to elect. *In re Allen*, 35 W. R. 218, 34 Ch. D. 433, and *Hester v. Hester*, 35 W. R. 233, 34 Ch. D. 607, followed. *Semble*, where a solicitor is acting for several trustees notice of election must be given to them all. *In re Metcalfe, Metcalfe v. Blencowe*, 36 W. R. 137 412
12. — **Election**—*General Order*, 1882, rule 6, *Lands Clauses Consolidation Act*, 1845.] Where money is paid into Court under statutes incorporating sect. 80 of the Lands Clauses Consolidation Act, 1845, the solicitor for the vendor may entitle himself to detailed charges, provided that he signifies his election "before undertaking the business." A sum of money was paid into Court by the Metropolitan Board of Works for lands belonging to the governors of a certain hospital. The hospital proposed to purchase certain ground rents out of the fund in Court, and instructed their solicitor accordingly. The solicitor wrote, saying that he elected that his remuneration for all business

SOLICITORS' REMUNERATION ACT, 1881—continued.

Page

- connected with the purchase should be in accordance with the system in force previously to the coming into operation of the Solicitors' Remuneration Act, 1881, as altered by Schedule 2 of the General Order made under that Act, and he requested the clerk of the hospital to inform the solicitor of the board of his intention. The solicitor of the board replied by saying that they required that the remuneration should be according to Schedule 1 to the General Order under the Solicitors' Remuneration Act, 1881. The Court approved of the proposed investment, and made an order that the board should pay to the governors of the hospital their costs, including all reasonable charges and expenses incident thereto of the re-investment of the amount payable under the agreement for purchase and of obtaining the order, and all proceedings relating thereto, with such costs, charges, and expenses to be taxed in case the parties differed. On delivering the bill the solicitor had charged in detail for the conveyancing business. The taxing master, upon taxation, decided that the election made by the solicitor was binding on the board, and allowed the detailed charges. The board carried in objections, which the taxing master overruled. The board then took out a summons to review the taxation, and raised the question: Whether upon a re-investment in land of purchase money paid into Court by promoters under the Lands Clauses Consolidation Act, 1845, the solicitor for the landowners obtaining the re-investment could, as against the promoters, elect to be paid otherwise than according to the scale in Schedule 1, part 1, of the General Order made pursuant to the Solicitors' Remuneration Act, 1881:—*Held*, that there was no ground for introducing any exception into rule 6 of the kind contended for by the board. *Re the Bridewell Hospital and Metropolitan Board of Works.* 57 L. T. 155. 403
13. — **Election—Administration Action—Sale of Realty—Insolvent Estate.**] Where an estate is insolvent it is the duty of the solicitor where realty is being sold in an administration action, if he elect to be paid not according to the scale charges, to bring the matter to the attention of the judge in chambers, or, at any rate, to give notice of his intention to the plaintiff before undertaking any part of the business. *In re Rackham, Carter v. Rackham.* W. N. 1889, 214 597
14. — **Election—Winding up—Official Liquidator—Employment of Solicitor—Taxation—Solicitors' Remuneration Act, 1881, Gen. Order, August, 1882, r. 6.**] On receiving notice from the solicitor, whom he has employed to act for him in the winding-up, that he elects to be paid for his work under Schedule II., and not according to the scale charge under the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, it is the duty of the official liquidator, in order to discharge his duty of protecting the assets of the company, to obtain the direction of the judge in chambers as to whether he ought to continue to employ a solicitor who requires payment on the more expensive footing. *In re United Kingdom Land and Building Association* 40 Ch. D. 471 507
- Compare below—**SOLICITORS' REMUNERATION ACT.** 28, 29, 30, 31, 41.

(e) INTEREST ON COSTS.

15. — **Interest on disbursements and costs—Demand from client.**] By General Order VII., under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), s. 5, the interest which a solicitor is entitled to recover under the Order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation; and it is provided that a solicitor may charge interest at 4 per

SOLICITORS' REMUNERATION ACT, 1881—*continued*.

Page

cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid, the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill :—*Held*, that the solicitor was entitled to such interest. *Blair v. Cordner*, 19 Q. B. D. 516 . 409

16. — **Interest on costs**—*Administration Action*—*Costs payable out of Fund*, 1 & 2 Vict., c. 110, ss. 17, 18 (*Revised ed. Statutes*, vol. xiii., p. 372)—23 & 24 Vict., c. 127, s. 27 (*Revised ed. Statutes*, vol. xiii., p. 881)—*Rules of Supreme Court*, 1883—*Order XLI*, r. 3; *Order XLII*, r. 16.] Where in an administration action costs have been directed to be taxed, and when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special direction, payable on the costs. *In re Marsden's Estate*, *Withington v. Neumann*, 40 Ch. D. 475 . 522

(f) JOURNEYS AND ATTENDANCES.

17. — **Journeys and attendances**—*Not connected with Conveyancing*.] A solicitor, who was employed by a board of guardians to prepare a scheme for the erection of cottages under the Labourers' (Ireland) Act, 1883, furnished his bill of costs, in which he charged fees of five guineas each for attendances and journeys in connection with the business. The taxing officer having reduced these charges to the amount that would have been allowed prior to the passing of the Solicitors' Remuneration Act, 1881:—*Held*, affirming the decision of the taxing officer, that, even assuming such business to come within the Act (which *seem*le it does not), the scale of taxation applicable was that which existed at the time of the passing of the Act, and not any higher one prescribed by the General Order of 1884. *Ex parte Strange*, 21 L. R. Ir. 529 . 493
Compare SOLICITORS' REMUNERATION ACT. 6, 7, 8, and 30.

(g) LANDS CLAUSES CONSOLIDATION ACT.

18. — **Lands Clauses Act** (8 & 9 Vic., c. 18)—*Sale under—Reinvestment of Proceeds—Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 Vict., c. 44)—*General Order*, August, 1882, r. 2, *Schedule I*, part I., r. 11—*Scale charges*.] Money arising from the sale of land belonging to a corporation, and taken by a railway company under their statutory powers, was reinvested in land under the direction of the Court. The solicitor for the corporation charged the *ad valorem* scale fee prescribed by the rules under the Solicitors' Remuneration Act, 1881, Schedule I., part I., "for investigating title and preparing and completing conveyance":—*Held* (affirming the decision of CHITTY, J.), that the exception in Schedule I., Part I., rule 11, which provides that the scale shall not apply in case of sales under the Lands Clauses Act, or any other private or public Act under which the vendors charges are paid by the purchaser, was not applicable to the case :—*Held*, also (approving the decision of KAY, J., in *Stanford v. Roberts*, 26 Ch. D. 155), that the words of rule 2 "not being business in any action or transacted in any Court or in the Chambers of any Judge or Master," apply only to the "other business" mentioned immediately before, *i.e.*, to business not being conveyancing business, and do not exclude from the scale conveyancing business done under the direction of the Court. *Held*, also, that as the purchaser's solicitor had had to do all the things which he would have had to do in a purchase not under the direction of the Court, the case was not taken out of the scale by the fact that, in a purchase

SOLICITORS' REMUNERATION ACT, 1881—*continued*.

Page

under the direction of the Court, he did not incur as much responsibility as in a private purchase : *Held*, therefore, that the scale fee was properly chargeable. *In re Merchant Taylors' Company*, 29 Ch. D. 209 ; 30 Ch. D. 28 . . . 287, 294
Compare SOLICITORS' REMUNERATION ACT. 12, 30, 34, and 43.

(h) LEASES.

19. — **Lease—Agreement for lease**—"Business connected with."] The scale fee prescribed by Part II. of Schedule I., to the General Order of August, 1882, under the Solicitors' Remuneration Act, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot charge for the preparation of the agreement in addition to the scale fee. Decision of PEARSON, J., affirmed. An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property and deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be the essence of the contract, and that, on the lessor complying with these conditions, the lessor should grant and the lessee accept a lease in the form thereto annexed :—*Held*, that these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but related only to the terms on which the lease was to be granted, and that the preparation of the agreement was "business connected with" the lease within the meaning of Rule 2 of the General Order, and could not be separately charged for. "Agreements for leases," in Schedule I., Part II., mean agreements for leases intended to be relied on as regulating the tenancy without any formal lease, and the scale fee is payable in respect of them. *In re Emmanuel and Simmonds*, 33 Ch. D. 40 . . . 332
20. — **Lease—Abortive negotiations.**] The remuneration of a lessor's solicitor prescribed in the General Order under the Solicitors' Remuneration Act, 1881, schedule I., part 2, does not cover negotiations carried on by the solicitor as to the letting of the property with persons other than the person to whom the lease is ultimately granted. The solicitor is entitled to remuneration for such negotiations as business "which is not in fact completed" under rule 2 (c) of the same General Order. *In re Field* (29 Ch. D. 608) and *In re Emmanuel and Simmonds* (33 Ch. D. 40) distinguished. *In re Martin (a Lunatic)*, 41 Ch. D. 381 . . . 546
21. — **Lease—Agreement for lease—Preparation, completion, and execution of lease.**] W. instructed H. and S. to prepare an agreement for a lease, and it was, on the 8th of August, 1881, duly prepared and its execution procured by them. The agreement contained a clause that the lease should be according to the terms set out in the schedule to the agreement. In 1883 W. instructed H. and S. to prepare the lease, and it was prepared according to the terms in the schedule to the agreement and afterwards executed. H. and S. then sent in to W. their bill of costs which contained an item of between £17 and £18 for the cost of preparing the agreement in 1881, and lower down in the bill was an item, dated June, 1883, in these words :—"Re-lease, &c. . . . To costs of preparing, engrossing, executing, and completing lease and counterpart as per Schedule I. of the Solicitors' Remuneration Act, £59 10s." Then followed an item of £23 15s. for stamps, and £6 12s. 9d for the costs of mortgagees who concurred in the lease. The Taxing Master, thinking that part of the work charged for in the £59 10s. had already been charged for in the item for preparing the agreement, taxed £20 off the £59 10s., and directed a detailed bill of costs for the

SOLICITORS' REMUNERATION ACT, 1881—*continued.*

Page

- preparation of the lease to be brought in, but did not tax the detailed bill, which amounted to £56 14s., including the above-mentioned items of £23 15s. and £6 12s. 9d. On a summons being taken out to review the taxation :—*Held*, that the Master was wrong in taxing off £20 and allowing the scale charges of Schedule I., Part II., of the Solicitors' Remuneration Act, 1881, and that the matter must go back to him with a direction to tax the detailed bill. *In re Hickley and Steward*, 33 W. R. 320 270
22. — *Lease—Rent—Shares—Money payment or premium.*] A firm of solicitors were employed by a lessor to prepare for him a lease of certain property for twenty-one years to a company, the consideration for the lease being a rent of £80 and the issue of 400 shares of the nominal value of £10. None of the company's shares had been sold, so that no market value had been placed upon them, and 200 of the 400 shares had not been issued. The solicitors charged the scale fee on the rent of £80, and also the scale fee for deducing title, perusing and completing deed as upon a premium of £4,000, the amount of the nominal value of the 400 shares :—*Held*, that they were not entitled to make the latter charge, as the value of the shares could not be estimated, and Rule 5, Part II., Schedule I., of the Remuneration Order, 1882, did not apply to such a case. *In re Hasties v. Crawford*, 36 W. R. 572 437
23. — *Lease—Scale fee—Lease in consideration of rent and premium.*] When a lease is granted in consideration partly of a premium and partly of a rent, the lessor's solicitor is under Rule 5 in Part II. of Schedule I. to the Solicitors' Remuneration Order, 1882, entitled to the scale fee mentioned in that rule in respect of the premium, even though no abstract of the lessor's title to the property has been furnished to the lessee. *In re Robson*, 45 Ch. D. 71 625
24. — *Lease—Fine and rent—No searches—No abstract of title.*] A lease was granted in consideration of a fine and of a rent : there were no searches and no abstract of title was prepared :—*Held*, that as the lessor's title had been accepted without investigation, the solicitor was not entitled under the schedule, but that his remuneration must be calculated under the old system. *Ex parte Ferguson and Co. to Buckley*, 21 L. R. Ir. 392 467
25. — *Lease—Deducing title—Furnishing searches.*] To entitle a solicitor to the per-centage charges under Schedule I., Parts I. and II. of the General Orders under the Solicitors' Remuneration Act, 1881, he must have deduced title to the premises, and if such deduction of title furnishing searches is an essential part. *In re Lacy & Sons* (25 Ch. Div. 301) followed. *Ex parte Ferguson & Co. to Buckley*, 21 L. R. Ir. 392 467
- Compare SOLICITORS' REMUNERATION ACT. 9, 28, 29.

(i) MORTGAGES.

26. — *Mortgage—Further charge—Previous investigation of title—General Order, Schedule I., Part I., r. 10.*] The tenant for life of settled estates had created charges on his life estate for sums amounting in the whole to £192,000, and the charges had all become vested in an insurance company. A private Act was passed which empowered the trustees of the settlement to raise, by mortgaging the settled estates in fee, any sum not exceeding £350,000, for the purpose of paying the debts of the tenant for life. The trustees executed a mortgage of the estates in fee to the company to secure £232,000. Of this sum £192,000 was retained by the company in satisfaction of the charges on the life estate (which were released by a separate deed), and £40,000 was paid to the trustees :—

SOLICITORS' REMUNERATION ACT, 1881—*continued*.

Page

Held, by NORTH, J., affirming the decision of the Taxing Master, that the transaction amounted to a further charge within the meaning of Rule 10 in Part I., of Schedule I., to the Solicitors' Remuneration Order, 1882; that the title to the property had been in substance already investigated within the meaning of that rule; and that the mortgagees' solicitor was not entitled to any scale fee in respect of the mortgage, but must be remunerated under Schedule II. to the Order:—*Held*, on appeal, that the transaction was a new mortgage, and not a further charge, and therefore did not fall within Rule 10, and that the mortgagees' solicitor was entitled to the scale fee on a mortgage for £32,000. *Earl of Aylesford v. Earl Poulett* [1891], 1 Ch. 248 657

27. — **Mortgage**—“*Perusing*” title deeds—*Solicitor making advance*.] A solicitor making advances to a client upon the security of real property and perusing for that purpose the title deeds of such property, is not entitled to charge at the rate of 1s. per folio “for perusing” under the 2nd Schedule of the General Order of August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44). *In re Robertson*, 19 Q. B. D. 1. 389

Compare SOLICITORS' REMUNERATION ACT. 2, 10, 35, 38, 40, and 48.

(j) PENDING BUSINESS.

28. — **Pending business**—*Negotiations for lease*—*Solicitors' Remuneration Act*, 1881 (44 & 45 Vict. c. 44), s. 7—*General Order*, August, 1882, r. 2 (a) (b) (c); *Schedule I.*, Part II.] Negotiations for a lease were carried on through the lessor's solicitor for two years before the rules under the Solicitors' Remuneration Act, 1882, came into operation. After they came into operation terms were come to, and a lease executed. The solicitor in his bill charged for the negotiations, and also charged the amount fixed by Schedule I., Part II., to the rules, as remuneration “for preparing, settling, and completing lease and counterpart.” The Taxing Master disallowed all the items for negotiations, and Mr. Justice CHITTY affirmed his decision. The solicitor appealed:—*Held*, by the Court of Appeal, that though the business had been commenced before the rules came into operation, the taxation must be conducted according to the rules, the solicitor not having declared his election to the contrary. Whether he might on the rules coming into operation have effectually declared such election, *quære*:—*Held*, further, that having regard to rule 2, the amount fixed by Schedule I., Part II., included the charges for negotiations, and that the appeal must be dismissed. *In re Field*, 29 Ch. D. 608 278

29. — **Pending business**—*Right to Elect*—*Sales and Leases sanctioned in an Action*.] The right of a solicitor, under rule 6 of the General Order in pursuance of the Solicitors' Remuneration Act, 1881, to elect that his remuneration shall be according to the old system as altered by Schedule II., may be exercised as to business pending at the time when the order came into operation, and in such case the election may be made after the time when the order came into operation, but must be made before any further work is done by the solicitor, to which the scale charges under the order would apply. The judgment in an administration action contained no general direction for the sale of the testator's real estate, but under various separate orders made in the action, and before the order under the Solicitors' Remuneration Act came into operation, sales and leases of parts of such estates were directed or sanctioned. After the order came into operation, the plaintiff's solicitor gave him notice that in all matters relating to the estate he proposed

SOLICITORS' REMUNERATION ACT, 1881—*continued.*

Page

to charge according to the old system as altered by Schedule II. In determining the sufficiency of this notice, it was *held* that the separate transactions ought, in the taxation of the costs, to be treated and dealt with as separate matters, and that the business ought not to be deemed to be "undertaken" until the time arose at which the solicitor had done some work after the order came into operation, which would be covered by the scales under the General Order. *In re Love, Hill v. Spurgeon*, 40 Ch. D. 637 . 511

30. — **Pending business**—*Notice of Election*—"Undertaking any business"—*Lands Clauses Consolidation Act*, 1845, 8 & 9 Vic., c. 18, s. 82 (*Revised Ed. Statutes*, vol. ix., p. 647)—*Purchasers' Costs under that Act—Conveyance Grant of Easement over Land.*] The General Order under the Solicitors' Remuneration Act, 1881, is, by virtue of Sec. 7 of the Act, applicable to business completed before the order came into operation. The expression, "undertaking any business," in Rule 6 of the order means not merely accepting the retainer, but rather entering upon the work, that is doing something for which the solicitor is entitled to make a charge, whether such charge is or is not covered by the scale fee under the order. Solicitors were employed by a corporation in purchases of property for a waterworks scheme effected under statutory powers. The employment commenced before, and continued after the date when the General Order under the Solicitors' Remuneration Act, 1881, came into operation. After that date the solicitors gave the corporation notice, under Rule 6 of the order, that they elected to charge for the business done after the commencement of the Act according to the old system as altered by Schedule II. to the order. The solicitors delivered bills of costs relating (1) to business completed before the order came into operation; (2) to business pending when the order came into operation in which work was done after the order came into operation and before the notice of election was given; and (3) to business so pending in which no work was done after the order came into operation until after the notice of election was given:—*Held*, (1) that as to the completed business the order applied, and the taxation must be according to the scale in Schedule I.; (2) that as to the pending business in which work was done before notice of election, whether or not of a kind covered by the scale fee, the notice was ineffectual, and the taxation must therefore be according to the scale; (3) that as to any separate matters of conveyancing in which no work was done until after the notice of election, the notice, according to the decision in *In re Love* (40 Ch. D. 637), was effectual, and the taxation must therefore be according to the old system as altered by Schedule II. *Quære*, whether where work is done by solicitors under one and the same retainer it is competent for them, by delivering separate bills of costs for various branches of the work, to exclude the operation of the order as to some of such bills. The exception contained in Rule 11 of Schedule I, Part I., of the General Order, whereby in the case of sales under the Lands Clauses Act the scale is rendered inapplicable, extends only to vendor's costs and not to the costs of the purchasers. Grants by way of sale of rights and easements of laying and maintaining pipes in land are not "conveyances of property" within Schedule I., Part I., and, consequently, the scale is not applicable to solicitors' charges in respect of such grants. *In re Stewart*, 41 Ch. D. 494 . . . 533

31. — **Pending business.** The purchaser, under an agreement dated in June, 1882, agreed to pay the vendor's costs of making out and verifying his title. The vendor, until some time in December, 1882, employed a country solicitor, but in April, 1883, instructed a London firm of solicitors to act for him:—*Held*, that the London solicitors were only entitled to costs under Schedule I. of the

SOLICITORS' REMUNERATION ACT, 1881—*continued*.

Page

General Order to the Solicitors' Remuneration Act, 1881, which came into operation on the 31st of December, 1882, notwithstanding that the agreement was of a prior date. *In re Lacey*, 32 W. R. 233, 25 Ch. D. 301, followed. *Re Denne and Secretary of State for War*, 33 W. R. 120 . . . 266
Compare SOLICITORS' REMUNERATION ACT. 43.

(k) SALES.

32. — Sale—*Scale charge*—Whole business must be done—*Deducing title, perusing and completing conveyance*—Charges for pressure—Taxation—*Special circumstances*—Percentage.] A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th of March, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd of February, 1883, the vendor's solicitors sent in their bill of costs, in which they charged 30s. per cent. on the purchase-money of each lot, considering that this was the proper charge under Schedule I. to the General Rules under the Solicitors' Remuneration Act, 1881, which provides that amount of remuneration to a vendor's solicitor "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)." The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th of February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill :—*Held*, by BACON, V.C., that an order must be made for taxation of the bill with a direction that the taxations should be on the old system prevailing before the Solicitors' Remuneration Act, 1881 : *Held*, on appeal, that the case was governed by the new rules, but that the bill was framed on an erroneous footing, for that the *ad valorem* remuneration authorised by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed—viz., the deducing title and perusing and completing conveyance, was done : that here, as there was no deducing of title, but only perusal and completion of the conveyances, Schedule I. did not apply, but that under the General Order, rule 2 (c), the Solicitors' remuneration was to be regulated by the old system as modified by Schedule II. But *held*, that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorise taxation after payment : *In re Lacey & Son*, 25 Ch. D. 301 . . . 238
33. — Sale—*Investigating and deducing title*—Family arrangement—*Scale charge*.] Under a provision contained in a will the testator's sons took the real estate at a valuation, and took over the assets and liabilities of his business, the sons giving a mortgage to the trustees to secure the purchase money. The same solicitors acted for all parties in preparing the necessary deeds, and charged full vendors' and purchasers' costs, and also mortgagor's and mortgagee's costs under the scale :—*Held*, that they were only entitled to remuneration under Schedule II., for, as they had not "investigated and deduced title," the scale charge did not apply. *In re Keeping and Glog*, 58 L. T. 679 . . . 433
34. — Sale—*Statutory Title*—*Scale Charge*—Percentage—*Investigating Title*.] The Corporation of London resolved to purchase the old Bankruptcy Court, which, under sec. 68 of the Bankruptcy Act, 1861, was vested

SOLICITORS' REMUNERATION ACT, 1881—*continued*.

Page

in the Public Works Commissioners, the purchase money (£93,500) being payable out of funds in Court under various Acts, including the Lands Clauses Act, and representing lands of the Corporation taken by certain public bodies. On applying to the Commissioners the Corporation were informed that the property was vested in the Commissioners under the above section, and that they "did not agree to furnish any evidence of title, but would apply to the Lord Chancellor, under the section, for his authority to sell; and they subsequently wrote that the Lord Chancellor had authorised the sale by his secretary. The city solicitor, however, having regard to the terms of the section, required a written authority signed by the Lord Chancellor himself, which was duly obtained. The solicitor, having thus satisfied himself as to the Commissioners' title, obtained, on summons in chamber, an order sanctioning the purchase, the chief clerk, upon the production of the Lord Chancellor's authority and at the request of the solicitor, dispensing with the usual reference as to title. The purchase having been completed, the Corporation carried in their solicitor's bill for taxation, containing a charge of £278 15s., according to the scale in Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, for "investigating title and preparing and completing conveyance." The taxing master disallowed the charge, on the ground that there had been no investigation of title, and that therefore the scale charge did not apply. *In re Lacey & Son*, 25 Ch. D. 301. On a summons by the Corporation to review the taxation:—*Held*, that there had been an "investigation of title" within the terms of the General Order, and that therefore the scale charge applied. *Ex parte Mayor of London*, 34 Ch. D. 452 371

35. — *Sale—Scale Charge—Conditions of Sale—Preparation of Contract—Deducing Title—Completing the Conveyance—Mortgagees concurring—Settled Land Act, 1882—Sale by Tenant for Life—General Order of August, 1882—Solicitors' Remuneration in respect of Business connected with Sales—Auctioneers' Charges.*] Settled property, which had been put up for sale by auction by the tenant for life under the Settled Land Act, 1882, but withdrawn for want of any sufficient offer, having been sold by private contract on the same day:—*Held*, on summons by the trustees for the decision of the Court, that one charge, according to the scale set out in Part I. of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881, was payable out of the purchase money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducing the title and completing the conveyance, including the preparation of the contract; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase money. *In re Beck; in re Cartington Estate*, 24 Ch. D. 608 235

36. — *Sale—Release of outstanding Incumbrance.*] The costs of obtaining the release of an outstanding incumbrance on property sold are not covered by the scale charge allowed to the solicitor for a vendor by Schedule I., Part I., of the General Order made under the Solicitors' Remuneration Act, 1881. *In re Purcell and Lenehan, ex parte Bonass*, 27 L. R. Ir. 375 689

37. — *Sale—Remuneration for conducting sale by auction when Auctioneer paid by Client—Scale Fees.*] Part of I of Schedule I to the General Order of 1882 made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), prescribes an ad valorem scale fee for conducting the sale of property by public auction, and rule 11 provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid

SOLICITORS' REMUNERATION ACT, 1881—continued.

Page

- by a client to an auctioneer." Where the auctioneer's commission is paid by the client:—*Held*, reversing the decision of the Court of Appeal, that rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the General Order, sect. 2, sub-sect. (c), he is entitled to a *quantum meruit* for such work, the remuneration to be regulated according to the old system as altered by Schedule II. *In re Newbould*, 20 Q. B. D. 204, reversed. *In re Faulkner*, 36 Ch. D. 566, approved. *Parker v. Blenkhorn*, 14 App. Cas. 1 483
38. — *Sale—Scale Charge—Estate sold subject to Incumbrances.*] The property of a company in liquidation was sold by the solicitors of the official liquidator for £24,000 (subject to a mortgage of £900), and after the satisfaction of the claims of former successive owners, a sum of £1,750 remained for the official liquidator. The sale was confirmed by an order made in the liquidation, and the parties to the conveyance were the company, the official liquidator, the original owners, and certain intermediate purchasers who had claims for unpaid purchase money. The solicitors on taxation included in their bill of costs scale charges as upon a sale for £24,900 as follows:—Negotiating, £102 5s.; deducting title and completing, including contract, £107 5s. The taxing master disallowed the negotiating fee, and only allowed the scale charge upon the £1,750. On summons to review taxation:—*Held*, that the Court could look not only at the contract but at the substance of the transaction, and that, having regard to the whole of the matters with reference to the provisional contract coupled with the order, the liquidator's name was only used for the purpose of convenience, and that the taxing master's decision was right. *Re Grey's Brewery*, 56 L. T. 298 377
39. — *Sale—Bankruptcy—Sale of bankrupt's property subject to incumbrances.*] Where the property of a bankrupt is sold subject to incumbrances, the solicitor of the trustee in bankruptcy is under Rule 9 of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881—and the Bankruptcy Rules, 1886, General Regulations, Part VIII., r. 2—entitled to a percentage on the gross amount of the purchase money and not merely on the amount realised from the equity of redemption. *In re Gallard; Ex parte Harris*, 21 Q. B. D. 38 443
40. — *Sale—Mortgage to secure balance of Purchase Money—Investigation of Mortgagor's Title—Taxation after payment—Special circumstances—Mutual mistake of law—Solicitors Act, 1843 (6 & 7 Vict., c. 73), s. 41.*] When part of the purchase money is allowed to remain on mortgage of the property sold, the solicitor of the vendor-mortgagee cannot charge the scale fee under Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, for investigating the mortgagor's title. But where a fee of £95 was charged for such investigation, under a common mistake of the parties that the scale applied, the Court refused to accede to an application, made after payment, for taxation. *Re Glascodeyne v. Carlyle*, 52 L. T. 781 308
41. — *Sale—Suit for administration—Taxation of costs—General Orders, August, 1882, r. 2—Costs for conveyancing business in an action.*] Solicitors who transact conveyancing business in an action will, under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict., c. 44), and the General Order of August, 1882 (W. N., 1882, Pt. II., p. 358), be allowed taxed costs and charges for such business, according to the scales set forth in the schedules to the General Order. The proper construction of the language of sect. 2 of the Solicitors' Remuneration Act, 1881, is, that it refers to conveyancing matters which take place in an action as well as to those out of Court, and that the exception is only from "other business" not being conveyancing

SOLICITORS' REMUNERATION ACT, 1881—*continued.*

Page

- business; and accordingly where the Taxing Master had disallowed certain charges made for conveyancing business in an action, and under the scales of charges contained in the schedules to the General Order of August, 1882, he was directed to review his taxation. *Stanford v. Roberts* (26 Ch. D. 155) 248
42. — *Sale—County Court.*] The General Order of April 16th, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, is applicable to the County Court method of taxation of costs on a sale of lands in the County Court defined. *Kennedy v. Beaumont*, 24 Ir. L. T. R. 95 632
43. — *Sale—Conveyancing business in an action—Preparation by purchasers' solicitor of contract of sale—Election—Pending business.*] A decree for administration of an estate was obtained. The trustees afterwards sold certain pieces of land, part of the estate, to a railway company, and repurchased from the company part of the lands sold, as having become superfluous land. The conveyancing work was commenced before but finished after the 31st of December, 1882, when the General Order under the Solicitors' Remuneration Act, 1881, came into operation. In the case of the repurchase from the railway company, it was agreed that the purchase by the company which had not been completed should not be carried out, and that the trustees should accept such an assurance as would revert the land in them. There was no investigation of title, and the solicitor for the trustees prepared the contract:—*Held*, that the Act and General Order applied to the costs of the trustees in relation to the conveyancing work; but that they were entitled to charge for the preparation of the contract in addition to the scale fee fixed by Part I., of Schedule I., of the General Order. *In re Field and Stanford v. Roberts*, 32 W. R. 404, 26 Ch. D. 155, followed. *Fleming v. Hardcastle*, 33 W. R. 776 290
44. — *Sale—Partition Action—Costs of Defendants' Solicitors—Conveyancing.*] In a partition action an order was made for the sale of the estate and payment of the costs of all parties out of the proceeds. The plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale, and his solicitor was paid his costs in accordance with rule 2, sub-sec. (a), of the General Order under the Solicitors' Remuneration Act, 1881:—*Held* (reversing the decision of BACON, V.C.), that the solicitors of the defendants, who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance and obtaining its execution by their clients under rule 2, sub-sec. (c). *Humphreys v. Jones*, 31 Ch. D. 30 316
45. — *Sale—Scale Fee—Negotiation of sale by private contract—Contract conditional on sanction of Court—Payment of fee to estate agent.*] The solicitor to the trustees of property which was the subject of an action in the Chancery Division negotiated a sale thereof, and prepared and procured the due signature of a contract of sale and purchase conditional upon the sanction of the Court being given to it. In the course of the negotiation, and for the purpose of obtaining evidence to induce the Court to sanction the sale, he procured the opinions of two valuers, to whom fees were paid for reporting as to the value of the property, but who took no further part in the negotiation. The contract was sanctioned by the Court without alteration:—*Held* (reversing the decision of KAY, J.), that the solicitor had negotiated the sale within the meaning of rule 11 in Schedule I., Part I. to the General Order, and was entitled to the scale fee for negotiating a sale by private contract. *In re MacGowan; MacGowan v. Murray* [1891], 1 Ch. 105 667
46. — *Scale fee—Negotiation fee.*] S. employed H. as general agent with a view to developing an estate as a building property, on the terms of his

SOLICITORS' REMUNERATION ACT, 1881—*continued*.

Page

- having a commission of $2\frac{1}{2}$ per cent. on the purchase-money of all lands sold during his agency, and on the capitalised value of the rents of all leases granted during the same period. An offer was made at a time when H. was too ill to attend at his office, and the negotiation was conducted by W., the solicitor for S., but H. was consulted repeatedly, and gave advice as to the sale which was ultimately completed. On completion, H. was paid $2\frac{1}{2}$ per cent. on the purchase-money. W. in his bill of costs claimed the scale fee for negotiating the sale, which claim was resisted on the ground that the vendor had paid a commission to an estate agent. The Taxing Master allowed the scale fee, being of opinion that as the commission paid to H. was not a payment in respect of this particular transaction, but for general services, and would have been paid all the same if he had not intervened at all in the sale, it was not a commission within the meaning of the Solicitors' Remuneration Order, Schedule I., Part I., rule 11 :—*Held*, by NORTH, J., that if H. had not been called in at all in this transaction, the payment of the commission which would in that case have been a payment in respect of other work, would not have been a payment of commission within the rule, but that as H. had assisted in the negotiation he was paid for his assistance by the commission, although the commission covered other work ; that a commission, therefore, had been paid within the meaning of the rule, and that the scale fee for negotiation ought not to be allowed :—*Held*, by the Court of Appeal that NORTH, J., had put a correct construction on the rule. *In re Withall* [1891], 3 Ch. 8 633
47. — *Sale—Negotiation—Sale subject to leave of Court.*] What circumstances amount to negotiation by solicitor. *In re Reade's Trusts ; Salthouse v. Reade*, 33 S. J. 219 528
48. — *Sale—Perusing Abstracts—Taxation.*] Upon the construction of Schedule II. of the General Order (containing scales of charges) made in pursuance of the Solicitors' Remuneration Act, 1881, abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is therein fixed at 1s. per folio ; but the old scale of 6s. 8d. for perusal of every three brief sheets of eight folios each remains unaltered. *In re Parker*, 29 Ch. D. 199 273
49. — *Sale—Administration action—Leaseholds—Mortgage—Perusing conditions of sale.*] In an administration action, to which mortgagees of leaseholds were not parties, the plaintiffs obtained an order to sell the leaseholds, and that the money should be paid into Court. The order was made without the knowledge of the mortgagees. The plaintiffs wrote to the mortgagees, sending draft particulars and conditions of sale as settled by the conveyancing counsel to the Court "for your perusal." The mortgagees undertook to concur in the sale on condition that their mortgage debt and costs and expenses were provided for out of the proceeds of sale in Court, and they returned the conditions approved. The Taxing Master disallowed the fees charged at the rate of 1s. a folio for perusing the conditions of sale, but allowed a fee of one guinea for reading them. One of the grounds of disallowance was that conditions of sale were not such documents as were intended by the word "documents" in Schedule II. of the General Order made in pursuance of the Solicitors' Remuneration Act 1881. On summons to vary the Taxing Master's certificate :—*Held*, that (while not deciding that conditions of sale did not come within the word "documents") this was an extraordinary case where the Taxing Master had a discretion. *Re Rers ; Rees v. Rees*, 58 L. T. 69 417

SOLICITORS' REMUNERATION ACT, 1881—continued.

Page

50. — **Sale—Lands Clauses Consolidation Act—Perusal of Deeds in Abstract of Title.**] Under an order to tax the costs awarded to the owner of lands compulsorily taken by a company, his solicitor is not entitled to 1s. per folio for perusing deeds referred to in the abstract of title furnished. The General Order made in pursuance of the Solicitors' Remuneration Act, 1881, Schedule II., does not apply to such taxation. *In re River Bann Navigation Act, 1879*; *ex parte Olpherts*, 17 L. R. Ir. 168 319
51. — **Sale—Particulars of Sale—Documents.**] Particulars of sale are included in the word documents in Schedule II. *In re Reade's Trusts*; *Salthouse v. Reade*, 33 S. J. 219 528
52. — **Sale—Scale Charge—Sale—Land out of Jurisdiction—Irish Land—Lord Ashbourne's Act—Purchase of Land (Ireland) Act, 1885, 48 & 49 Vict., c. 73.**] The General Order under the Solicitors' Remuneration Act, 1881, fixing a scale charge does not apply to a sale of land not situated in England. Thus, where an English solicitor carried out a sale under Lord Ashbourne's Act, the Purchase of Land (Ireland) Act, 1885, of land in Ireland belonging to a client, and employed an Irish solicitor to do so much of the work as had necessarily to be done in Ireland:—*Held*, that the English solicitors' remuneration was not regulated by Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881. *In re Greville's Settlement*, 40 Ch. D. 471 475

SUBPŒNA DUCES TECUM—When *subpœnas duces tecum* have been directed by counsel, and are necessary to enforce the production of documents, they should be allowed. *Jessop v. Cusack*, 25 L. R. Ir. 244 634

- SUBSTITUTION OF SERVICE**—1. **Costs when allowed—Settlement of action within six days of service of summons and plaint.**] Where the plaintiff had obtained an order to substitute service, and within six days of the substituted service the defendant tendered the sum due and £2 10s. for costs, under first General Order, 22nd January, 1856, it was held that the plaintiff could not recover the costs of the order for substitution of service. *Atkinson v. Gregory*, 1 Ir. L. T. 157 5
2. — **Costs when allowed—Practice—Costs of taxation—First General Order of 22nd January, 1856.**] Costs of proceedings to substitute service of summons and plaint allowed on taxation between party and party. Costs of taxation allowed. *Johnson v. Eason*, 5 Ir. L. T. R. 6 41
3. — **Costs when allowed—Writ of summons—Judgment by default—Costs.**] Where a defendant upon whom service was substituted allowed judgment to go by default:—*Held*, that the plaintiff in marking judgment was entitled to add to the sum allowed by Order VIII., rule 2 (April, 1878), the taxed costs of the motion to substitute service. *Eager v. Buckley*, 8 L. R. Ir. 99 225

T

- TENDER**—1. **After Issue, but before Service, of Writ**—A defendant cannot escape paying the costs of a writ of summons by tendering the amount sued for without costs before service, but after issue, of the writ. *O'Malley v. Guardians, Kilmallock Union*, 22 L. R. Ir. 326 447
2. — **After Service of Civil Bill—Costs.**] What costs should be tendered along with debt after service of the civil bill. *Newry Steam Brated Co. v. —*, 9 Ir. L. T. 194 151

TENDER—*continued.*

Page

3. — **After service of Civil Bill—Instructions.]** Where the amount sued for by an ordinary civil bill is tendered before entering the civil bill, the plaintiff's solicitor is entitled to the prescribed fee for instructions. *Bell v. M'Nally*, 16 Ir. L. T. R. 14 226
- before action brought—lodgment of sum tendered—drawn out in full satisfaction 212
- See* PAYMENT INTO COURT. 3.

THREE COUNSEL—Costs of.*See* COUNSEL. 1, 2, 11, 12, 13.

- TRAVELLING EXPENSES**—*Plaintiff suing in person—Interlocutory proceedings—Travelling expenses.]* The travelling expenses of a person suing in person, incurred for the purpose of conducting in person interlocutory proceedings are not taxable items in party and party costs awarded against the opposite party in the action. *Anthony v. Walshe*, 22 L. R. Ir. 619, App. 622 . 425
- Marshal's 16
- See* ADMIRALTY. 1.
- Auctioneer's 16
- See* ADMIRALTY. 1.
- not connected with conveyancing 493
- See* SOLICITORS' REMUNERATION ACT. 17.

- TRIAL**—What constitute costs of trial. *In the Goods of Hayden*, 23 Ir. L. T. 566 557

- TRUSTEE RELIEF ACT**—*Costs of lodging money.]* The sum allowed to trustees for the costs of lodging money under the Trustee Relief Act in ordinary cases will be £8. *In re Boyd's trusts*, I. R. 1 Eq. 489 15

U

"UNDERTAKING ANY BUSINESS."*See* SOLICITORS' REMUNERATION ACT. 9, 10, 11, 12, 28, 29, 30.

- UNNECESSARY MOTION FOR LEAVE TO REPLY**—Where there are two replications filed to a plea, one of which merely takes issue on the truth of the defence, and the issue on the other is decided adversely to the plaintiff, the costs of the replication and motion for leave to reply will not be allowed to the plaintiff, though successful in the action. *Guinea v. Allen*, I. R. 1 C. L., 331 1

V

- VENUE, MOTION TO CHANGE**—After payment into Court.

See PAYMENT INTO COURT. 4 & 5.

- VIEW JURY.]** Costs incidental to a view jury in county court obtained by the plaintiff are not taxable against the defendant. *Gregg v. Johnson*, 25 Ir. L. T. R. 20 651

W

Page

- WITNESSES' EXPENSES—1. Discretion of Taxing Master.]** The taxing master, in allowing the expenses of witnesses on the taxation of costs, should be guided by the direction of proofs by counsel rather than by what took place at the trial. *Heffernan v. Vaughan*, 18 Ir. L. T. R. 38 254
2. — **Discretion of Taxing Master.]** In an action for breach of warranty of a horse sold to the plaintiff, who resided in England, the plaintiff produced, as witnesses at the trial, three English veterinary surgeons, who had examined the horse shortly after the purchase, and deposed to its unsoundness. The plaintiff recovered a verdict, and the taxing master having, on taxation, disallowed the expenses of two of these witnesses, the judge at the trial considering them necessary witnesses:—*Held*, that their expenses should be allowed. *Weston v. Steeds*, 24 L. R. Ir. 283 553
3. — **Scientific witnesses—Fees for qualifying to give evidence—Briefing proceedings in action in which a question similar to that in issue was involved.]** Fees to scientific witnesses for qualifying themselves to give evidence may in proper cases be allowed as between party and party, when sufficient information as to how the amount of such fees has been made up is laid before and considered by the taxing master. The rule as to special fees paid to counsel is applicable to the case of scientific witnesses, and special fees paid to experts of peculiar eminence, even when taxable between solicitor and client, will not be allowed as between party and party. The costs of briefing the proceedings in an action in which a question similar to that in issue was involved was disallowed as between party and party. *Thompson v. Moore*, 25 L. R. Ir. 98 609
4. — **Valuers' fees—Affidavits.]** Upon taxation of costs between party and party, the sums paid to witnesses for inspecting, measuring, and valuing improvements upon lands, will not be allowed in addition to the charges for the affidavits made by those witnesses. *Murphy v. Nolan*, 1. R. 7 Eq. 493 126
- called by notice party.
See NOTICE PARTY.
5. — **Medical witness—Allowance for Attendance at Assizes.]** Fee of £3 3s. a day and expenses, notwithstanding Treasury Scale only sanctioning £2 2s. per day allowed to medical witness when not residing in assize town. *Queen v. Nesbitt*, 20 Ir. L. T. R. 56 323
6. — **Professional witness—Daily fee.]** The daily fee allowed to a professional witness on taxation between party and party is not necessarily limited to £3 3s. In this case a fee of £5 5s. a day was allowed to an engineer and architect of eminence employed under the direction of the Court. *Robb v. Connor*, 1. R. 9 Eq. 373 135
- number and materiality of witnesses—questions for Taxing Master 29
See ADMIRALTY. 2.
- material witness not examined 44
See GENERAL COSTS OF ACTION.
- preparing evidence—bringing up for hearing—offer to examine *de bene esse* or by affidavit—witness not examined 29
See ADMIRALTY. 2.
- Detention—Wages—Travelling expenses 29
See ADMIRALTY. 2.

WITNESSES' EXPENSES — <i>continued.</i>	Page
— Amount of <i>viaticum</i> . . . . .	. 181
<i>See</i> ELECTION PETITION. 2.	
— Remuneration for loss of time—Medical witnesses . . . . .	. 104
<i>See</i> SOLICITOR AND CLIENT COSTS. 2.	
WRIT OF RESTITUTION —Costs payable—Rent under £100 per annum . . . . .	. 231
<i>See</i> ACTION TO RECOVER POSSESSION OF LAND. 2.	
WRIT OF SUMMONS —Ejectment—Fee to counsel for settling . . . . .	. 343
<i>See</i> ATTENDANCE. 2.	
— Fee to counsel for settling—Discretion to allow . . . . .	. 395
<i>See</i> COUNSEL. 3.	
— Tender of debt after issue . . . . .	. 447
<i>See</i> TENDER. 1.	

2187

